Tenure Rights In Contractual And Constitutional Context

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Introduction

Tenure as a working concept in academic employment has come to exist for numerous reasons including the desire to protect the academic freedom of the faculty and the need to provide job security in order to draw and retain good people.[1] The basic goal of tenure is to insure that faculty members will not be dismissed without adequate cause and without due process.[2] Studies indicate that in 1972 approximately 94 percent of all faculty members in American universities and colleges served at *institutions* recognizing tenure in some form.[3]

Until the early 1970's the courts had been largely uninvolved in resolving disputes about the legal aspects of academic tenure. Since that time however, a relative explosion of litigation has occurred in higher education and in appreciable measure has involved the area of tenure and employment contracts. In view of the diversity of the legal implications arising from these decisions, this article, although focusing primarily on the contractual aspects of tenure, will also include an examination of its relationship with constitutional issues so as to completely define the current legal status of tenure in institutions of higher education. The article begins with a discussion of the definition of tenure with its legal implications and then examines the contractual aspects of tenure such as how tenure may be created, the validity of permanent duration contracts, the difficulty of a state modifying a vested contract right to tenure, and, lastly, the appropriate remedies for contract violations. It then proceeds to analyze the interrelationship between tenure and constitutional rights, both substantive, such as first amendment-academic freedom issues, and procedural, such as fourteenth amendment due process issues. The final section will use the Virginia law on the above issues

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[1] *See* Brewster, 1971-72. President's Report, Yale University reprinted in 58 AAUP, BULL. 381 (1972); Van Alystyne, *Tenure: A Summary, Explanation, and "Defense"*, 57 AAUP BULL. 328, 330 (1971.)

[2] *See, e.g.*, B. SHAW, ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION (1971).

[3] *See* W. FURNISS, FACULTY TENURE AND CONTRACT SYSTEMS—CURRENT PRACTICE (American Council on Education Special Report 1972) and cited in COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE (1973). *See generally*, B. SMITH, THE TENURE DEBATE (1973).

to illustrate the likely outcome of legally enforceable tenure rights in a state without a tenure statute.

I. CREATION AND VALIDITY OF ENFORCEABLE TENURE RIGHTS

A. Tenure Defined

It is often difficult to generalize the non-legal, academic aspects of tenure. It has been observed that:

> [T]enure is embodied in a bewildering variety of policies, plans and practices; the range reveals extraordinary differences in generosity, explicitness and intelligibility. Large or small, public or private, non-sectarian or religiously affiliated, there is no consensus concerning either the criteria or the procedures for acquiring and terminating tenure.[4]

Tenure for centuries has been dealt with inside academic institutions and thus has not been subjected to the outside spotlight of judicial inquiry and interpretation as to its non-academic legal implications.

The most widely-accepted academic definition of tenure is the statement of college and university tenure principles promulgated and adopted by the American Association of University Professors and the Association of American Colleges which for the purpose of promoting academic freedom and providing a degree of economic security in pertinent part provides:

> After the expiration of a probationary period, teachers . . . should have permanent or continuous tenure and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.[5]

As will be discussed subsequently, recent case law brings into clearer focus the sometimes apparent dichotomy between the theoretical principle of tenure and its practical application. On that point it has been observed:

> If there is any truth to the conception of tenure as unbreakable, it is because of institutional practices rather than because of precise protective doctrines developed by the courts. Nothing in the rationales, norms, or rules of tenure legally shields any faculty member from accountability for performance as teacher, scholar, and colleague.[6]

The legal effect of a tenure system is to place restrictions on the power of the employing institution to terminate tenured professors except for cause and after a hearing. A recent leading case in discussing that power held:

> Although academic tenure does not constitute a guarantee of life employment, i.e. tenured teachers may be released for "cause" or for reasons of the kind here

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[4] C. Byse & L. Joughin, Tenure In American Higher Education: Plans, Practices, And The Law 133 (1959).

[5] For complete statement and interpretations *see Academic Freedom and Tenure: 1940 Statements of Principles and Interpretive Comments*, 60 AAUP BULL. 269 (1974). Also listed in that publication are 88 professional associations including the Association of American Law Schools which have endorsed the principles.

[6] Commission On Academic Tenure In Higher Education, Faculty Tenure 190 (1973).

> involved [financial exigency], it denotes clearly defined limitations upon the institution's power to terminate the teacher's services.[7]

Additionally, procedural benefits accrue to tenured professors in that (1) tenure policies providing specific procedural standards must be followed explicitly unless waived by the parties involved,[8] (2) the employing institution in order to terminate a tenured professor has the two-fold burden of (a) proving that "adequate cause" exists and (b) initiating the termination proceedings.[9]

Courts have also been called upon to judicially determine institutional policies relating to the meaning of the term "adequate cause". The Nevada Supreme Court in reviewing the dismissal of a tenured professor stated that "cause" means legal cause, and not merely any cause deemed sufficient.[10] That is, it had to be of a substantial nature directly affecting the rights and interest of the public and had to touch the qualifications or performance of the professor's duties, showing that he is not a fit or proper person to hold the position. Of course the university regulations can be more specific and more carefully define "cause" as including incompetency, immorality, misconduct, neglect of duty, incapacity, and insubordination.[11] The courts have varied in their approach as to whether they will make an independent review of the substantive charge[12] or place more emphasis on the procedures followed thus deferring to academic judgments.[13] In the final analysis, although the courts may wish to give deference to such institutional judgments, in recent years the courts have been inclined to intervene and provide legal interpretations of adequate cause.[14]

B. Creation of Contractual Tenure Rights

Tenure may be obtained by faculty members following a probationary period after having met prescribed institutional standards. Quite commonly the authority to grant tenure may be found in a comprehensive statutory scheme which provides the right to continued employment subject only to removal in a prescribed manner for enumerated causes.[15] For example in

[7] AAUP v. Bloomfield, 129 N.J. Super. 249, 322 A.2d 846, 853 (1974), *aff'd* 346 A.2d 615 (App. Div. 1975). For similar holdings *see* Zumwalt v. Trustees of the California State Colleges, 33 Cal. App. 3d, 109 Cal. Rptr. 344 (1973) and Gould v. Board of Education of Ashley Community Consolidated School Dist. No. 15 of Washington County, 32 Ill. App. 3d 808, 336 N.E. 2d 69 (1975).

[8] *Gould, supra* note 7. Mabey v. Reagan, 376 F. Supp. 216 (N.D. Cal. 1974); Bowing v. Board of Trustees of Green River Community College Dist., 11 Wash. App. 33, 521 P.2d 220 (1974).

[9] *See, e.g.*, AAUP v. Bloomfield College, *supra* note 7, and Chung v. Park, 377 F. Supp. 524, 529 (M.D. Pa. 1974). This is contrasted with burdens of proof on the nontenured professor. Frazier v. Curators of University of Mo., 495 F.2d 1149, 1153 (8th Cir. 1974); Fluker v. Alabama State Board of Education, 441 F.2d 201, 206 (5th Cir. 1971).

[10] State *ex rel.* Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953).

[11] *See* B. SHAW *supra* note 2, at 62–65.

[12] State *ex rel.* Richardson, *supra* note 10.

[13] *See, e.g.*, Koch v. Board of Trustees, 39 Ill. App. 2d 51, 187 N.E. 2d 340 (1962), *cert. denied*, 375 U.S. 989 (1964).

[14] *See, e.g.*, Chung v. Park, 514 F.2d 382 (3d Cir. 1975).

[15] For interpretations under such systems, *see* Annot., 66 A.L.R.3d 1018 (1975).

Virginia the public school teachers after a probationary period are granted "continuing contracts" during good behavior and competent service.[16] Alternatively, a statute (or in the case of a private college, a charter and by-laws) may grant the authority to the college or university governing board to enter into contracts with faculty members. The board, pursuant to a tenure policy then grants tenure as part of the employment agreement. The agreement may explicitly state that tenure has been awarded or the agreement may incorporate by reference the university handbook containing tenure regulations. Additionally, "de facto tenure" or implied contractual rights may arise so as to create an expectancy in future employment. Whether this expectancy will rise to the level of an enforceable contract will depend on state law; however, the Supreme Court in *Perry v. Sindermann* held that when a faculty member has a concrete expectancy in future employment fostered by the educational institution then he is entitled to pre-termination procedural due process in order to prove the validity of his claim.[17]

The award of tenure typically follows a faculty recommendation and then must be approved by an affirmative act of the educational institution as opposed to a passive or automatic right of a faculty member meeting the standards following the probationary period. However, in a very few but recent cases, tenure has been granted by default.[18] In those cases the tenure provisions called for the award of tenure or dismissal after certain time periods; the failure of the educational institution to implement its decision to dismiss within the prescribed time caused the court to hold that the professors were entitled to tenure. Other cases have held contrary. For example in a case in which an arbitrator awarded reinstatement to a professor who had not been timely notified, the court reversed and held that reinstatement would be tantamount to awarding tenure, a matter left solely to the discretion of the governing board by statutory right.[19]

1. Formation of Contracts for Tenure Through Incorporation By Reference

Assuming the lack of explicit statutory authority creating tenure rights, the authorization permitting such arrangements usually flows from the statutorily created right of a governing board to enter into contracts with its faculty. Absent statutory or constitutional limitations the normal doctrines of contract law will then govern the legal relationship between the faculty and the board. Therefore if a board enters into an agreement with a faculty member granting tenure there should be little doubt that a contract has been formed subject to the subsequent discussion regarding the validity of such "permanent duration" contracts.

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[16] VA. CODE ANN. §§22-217.1 to 217.8 (Repl. Vol. 1973).

[17] 408 U.S. 593 (1972). The rights of faculty members to procedural due process will be discussed subsequently in Section II.

[18] Chung v. Park, *supra*, note 14. Bruno v. Detroit Institute of Technology, 51 Mich. App. 593, 215 N.W. 2d 745 (1974); and *see*, Cusamano v. Ratchford, 507 F.2d 980 (8th Cir. 1974). *But see*, Sheppard v. West Virginia Board of Regents, 378 F. Supp. 4 (S.D. W. Va. 1974).

[19] Legislative Conference of City University of New York v. Board of Higher Education of City of New York, 38 App. Div. 2d 478, 330 N.Y.S. 2d 688 (1972).

The Supreme Court has suggested the context within which a discussion of the formation and validity of contracts for tenure may take place in that it has acknowledged the validity of written contracts with explicit and implied tenure provisions, and has noted:

> . . . The law of contracts in most, if not all, jurisdictions long has employed a process by which agreements though not formalized in writing may be 'implied.' . . . Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' . . . And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.'[20]

The Court went on to say that there may well be an unwritten common law in a particular university that certain employees shall have the equivalent of tenure; but the Court did indicate the legal validity of such arrangements would depend on relevant state law.[21] The Court ultimately held that the professor be given an opportunity to prove the legitimacy of such claim, a task which is undertaken in the following pages.

Formation of a contract for tenure, as stated above, may come about even though not explicitly stated in the employment agreement. This is accomplished by the doctrine of incorporation by reference which may make college regulations part of the contract either directly by express reference to them or indirectly by implying their incorporation through a process of interpretation.

Courts have sanctioned both approaches. For example an express statement by the parties that the rules of the handbook are to be incorporated by reference into the employment contract provides the basis of a courts finding that the entire agreement includes definitions, procedural and substantive rights which are in the handbook and relate to tenure and notification requirements.[22]

A more general reference in the agreement that the "rules and regulations" of the university are included also causes the courts to include the handbook's definition and rights of tenure[23] as part of the agreement through the usual processes of contract interpretation.[24]

Most commonly the parties to a lawsuit stipulate or the court holds that the handbook is *impliedly incorporated* as part of the total employment agreement.[25] For example in *Greene v. Howard University* the court found:

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[20] Perry v. Sindermann, 408 U.S. 593, 601-602 (1972) and *see* Justice Burger (concur) *Id.* at 603. For general discussion see 3A A. CORBIN, CONTRACTS §§561-572 A (1960).

[21] *Id.* In Board of Regents v. Roth, 408 U.S. 564, 577 (1972) the Court in defining property interests points out they are created by " . . . existing rules or understandings that stem from an independent source such as state law rules, or understandings that secure certain benefits and support claims of entitlement to those benefits."

[22] ASSAF v. University of Texas System, 399 F. Supp. 1245, 1248 (S.D. Tex. 1975); and *see* Downs v. Conway School District, 328 F. Supp. 338, 349 (E.D. Ark. 1971); State v. Avers, 108 Mont. 547, 92 P.2d 306, 310 (1939).

[23] Collins v. Parsons College, 203 N.W. 2d 594 (Iowa 1973).

[24] Hillis v. Meister, 82 N.M. 484, 483 P.2d 1314, 1315 (1971).

> The employment contract of appellants here comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs.[26]

The court moreover found that appellants had legitimate basis to rely on the regulations as part of the employment agreement and to the extent a valid contractual arrangement would not be found the University would be estopped under the familiar contract principle of promissory estoppel.[27]

This widely accepted proposition of impliedly incorporating regulations by reference is extremely significant in that it may create an enforceable contract for tenure even though tenure has not been explicitly provided for in the written employment agreement, although of course it is pursuant to University policy. A perhaps cautionary observation of this developing area of law is stated in *Greene:*

> [C]ontracts are written and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.[28]

2. *Efficacy of Disclaimers*

Some universities seeking to negate the formation of a contract for tenure by incorporation of the regulations in the handbook have placed a statement in the handbook expressly disclaiming its effectiveness as a basis of contract obligation. However in those few cases which have litigated the matter the effectiveness of these disclaimers has been seriously questioned if not limited. For example in *Greene v. Howard University* the D. C. Circuit Court of Appeals held that a private university having on one hand granted certain notice rights to the faculty regarding non-reappointment could not on the other hand effectively stipulate: "without any contractual obligation to do so."[29]

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[25] Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975); Cusumano v. Ratchford, *supra* note 18, at 982; Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975); Downs v. Conway School District, *supra* note 22; AAUP v. Bloomfield College, *supra* note 7, at 847; Rehor v. Case Western Reserve, 32 Ohio St.2d 224, 331 N.E. 2d 416 (1975); Bruno v. Detroit Institute of Technology, *supra* note 18, at 747; Greene v. Howard University, 412 F.2d 1128 (D.C. Cir. 1969) hereinafter cited as Greene; Hillis v. Meister, *supra* note 24; Zimmerman v. Mindt, 198 N.W. 2d 108 (N.D. 1972).

[26] Greene, *supra* note 25.

[27] *Id.* at 1134 *note* 8, citing RESTATEMENT OF CONTRACTS §90 (Tentative Draft No. 2, 1965) and Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

[28] Greene; and *see* Georgia Ass'n. of Education v. Harris, 403 F. Supp. 961, 964 (N.D. Ga. 1975).

[29] Greene, *supra* note 25; *see also* J. WILLISTON, CONTRACTS §610B at 533 (3d ed. 1961), " . . . courts have the power to inquire into the real purpose of the agreement; language, though seemingly plain and clear, will not bear a literal interpretation if this leads to an absurd result or thwarts the manifest intention of the parties." *See also* Moran v. Standard Oil, 211 N.Y. 187, 105 N.E. 217 (1914).

A similar result is found in a case involving a public university wherein the university disclaimed the efficacy of the regulations as "not contractual."[30] The Court however in finding the regulations effectively incorporated also held that the disclaimer was ineffective in that the "course of conduct" of the parties in regularly following the handbook regulations demonstrated that it . . ."considered [it] to govern the University's relationship with plaintiff . . . in managing the University."[31]

As to whether this type of contract interpretation was applicable to a *public* institution the court responded:

> *Our answer is that the issues here does not involve the public or private character of the University. . . . The issue here simply involves the law of contracts.*[32] (ephasis added)

The Supreme Court of Ohio in a different but related case, *Rehor v. Case Western Reserve University*, has held that a properly worded reservation of rights in the handbook[33] will permit a university to change a retirement policy that was part of the handbook regulations incorporated into faculty employment contracts,[34] but that will not necessarily change the above result.

3. Vesting of Contract Rights

The *Rehor* case raises the significant additional issue of whether employment contract rights, especially as regards the grant of tenure, once vesting can be subsequently modified by the employing institution. The majority of the court in *Rehor* held that according to rules in the University handbook it could modify its retirement policy. It also held that faculty agreements which had incorporated the earlier retirement policy could be subsequently modified if supported by consideration. The dissent argued that proper contract analysis would find that although the University had the *power* to change its retirement policy it had the concomitant duty to compensate those adversely affected. It added that a clearer reading of the policies incorporated into the contract " . . . suggests that something akin to a 'grandfather clause' is necessary for those faculty members adversely affected."[35] The majority found sufficient evidence existed to support its reasoning that the professor's earlier vested contractual retirement rights were subsequently modified by the changed policy (pursuant to an approved procedure also included in the handbook) and accepted by the professor who agreed to subsequent employ-

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[30] Hillis v. Meister, *supra* note 24, at 1316–17.

[31] *Id.* at 1317; *see also* Bradley v. New York University, 124 N.Y.S. 2d 238 (Sup. Ct. 1953), *aff'd*, 283 App. Div. 671, 127 N.Y.S. 2d 815, *aff'd mem.*, 307 N.Y. 620, 120 N.E. 2d 828 (1954).

[32] Hillis v. Meister, *supra* note 24, at 1317.

[33] 43 Ohio St. 2d 224, 331 N.E. 2d 416, 421 (1975). "The Board of Trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of members of the several faculties as said board designates."

[34] *Id.* at 422.

[35] *Id.* at 424.

ment contracts which incorporated the new policies.[36] The Court found that salary increases in the subsequent employment contracts provided adequate consideration to support the new modifying agreement.[37] Agreement on the precise holding of *Rehor* may be difficult; it appears to stand for the proposition that contract rights may vest and be subsequently modified by an agreement supported by consideration. The question of whether the retirement policy, the subject matter of the vested right, could have been changed absent the contractual reservation to change policies including that right was not before the court and thus the resolution of the vesting issue absent modification supported by new consideration will be left to the contract law of each state.[38]

4. Tenure as a Restriction on Restructuring Academic Programs

A related question is the extent to which tenure may restrict a state or educational institution in its restructuring or discontinuing academic programs which cause the displacement of tenured faculty. It is well established that tenure does not provide a guarantee against institutional change. As discussed earlier, typical tenure procedures provide that tenured faculty may be terminated for justifiable reasons, which include the AAUP recommended bases of financial exigency, discontinuance of a program or department, or for medical reasons.[39] To begin the analysis one must first assume that tenure is validly created and enforceable as an employment contract right and that AAUP recommended regulations are part of the contract either because they are incorporated by reference directly or through contract interpretation as custom and usage.[40]

"Financial exigency" which justifies termination of a tenured faculty member, as defined by Regulation 4 of the AAUP Recommended Regulations on Academic Freedom and Tenure, occurs when "an imminent financial crisis" exists "which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."[41] Recent case law has held such

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[36] *But see* Collins v. Parsons College, *supra* note 23, at 598, where the court finds that acceptance of new one year contracts did not waive contract rights to tenure.

[37] Rehor v. Case Western Reserve University, *supra* note 25, at 331 and 421. For analysis questioning the courts reasoning, *see* Finkin, *Contract, Tenure, and Retirement: A Comment on Rehor v. Case Western Reserve,* 4 HUMAN RIGHTS 343 (1975).

[38] There remains of course the developing analogous case law which holds that university regulations are part of the faculty member's employment contract and must be adhered to; *see supra* n.25; and *see* Decker v. Worcester Junior College, 336 N.E. 2d 909 (Mass. 1975); Fredericks v. School Board of Monroe County, 307 So. 2d 463 (Fla. 1975); ASSAF v. University of Texas System, 399 F. Supp. 1245 (S.D. Tex. 1975); Mabey v. Reagan, 376 F. Supp. 216, 223 (N.D. Cal. 1974); and Bowing v. Board of Trustees of Green River Community College Dist., *supra* note 8. An additional issue discussed subsequently deals with the issue of whether vested contract rights are protected by the constitution from impairment by subsequent legislation.

[39] *Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons* [Regulation 4], 62 AAUP BULL. 17 (1976).

[40] *See e.g.*, Browzin v. Catholic University of America, 527 F.2d 843, 847-848 (D.C. Cir. 1975).

[41] *Id.*; for a thorough discussion of this policy in its legal context, *see* Brown, *Financial Exigency*, 62 AAUP BULL. 5 (1976).

regulations to be enforceable. In *AAUP v. Bloomfield College*[42] the New Jersey court upheld the "financial exigency" restriction on the University's authority to terminate tenured faculty and defined the phrase as "an immediate, compelling crisis."[43] The reviewing court in affirming this holding stated "not only must the financial exigency be demonstrably bona fide but the termination *because* of that exigency must also be bona fide."[44] The rationale for that point is found in *Browzin v. Catholic University of America*[45] a similar, recent case decided by the D. C. Court of Appeals which in enforcing the AAUP regulation in pertinent part held:

> But the obvious danger remains that "financial exigency" can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher....[46]

In further defining the term "financial exigency" a recent Iowa decision, without significant discussion, found the term to mean "current operating deficit."[47] Two other decisions involve the situation where the legislatures of Nebraska and Wisconsin cut appropriations which arguably necessitated a reduction in the number of faculty at the state educational institutions.[48] Although the actual issue dealt with was the constitutional adequacy of termination procedures, the court in holding that the tenured faculty were properly dismissed also found that financial exigency existed, though that aspect was not developed in the opinion. It is important to note that the court required that an opportunity be provided to demonstrate the bona fideness of reasons for dismissal.

Under the 1976 AAUP regulations, a tenured faculty member may be properly terminated if his program or department is discontinued. While this should resolve the initial inquiry as to whether a state is fettered in its ability to restructure academic programs within and between institutions, obligations and unanswered questions remain. The obligations suggested by the regulations include faculty-administration discussions on appropriate procedures to be followed and alternatives to be explored relevant to the restructuring and its effects. One of those obligations, the duty of the institution to assist displaced faculty members in finding "another suitable position" has been litigated.[49] In *Browzin v. Catholic University of America*[50] the D. C.

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[42] 129 N.J. Super. 249, 322 A. 2d 846 (1974), *aff'd*, 346 A. 2d 615 (App. Div. 1975).

[43] *Id.* at 858 (1974).

[44] 346 A. 2d 615, 617 (1975).

[45] 527 F.2d 843 (D.C. Cir. 1975).

[46] *Id.* at 847.

[47] Lumpert v. University of Dubuque (unreported 1974), on appeal to Iowa Supreme Court, Case No. 2-57568 (1975).

[48] Levitt v. Board of Trustees of Nebraska State Colleges, 376 F. Supp. 945 (D. Neb. 1974); Johnson v. Board of Regents of the University of Wisconsin System, 377 F. Supp. 227 (W.D. Wis. 1974) (under the Wisconsin statute no provision is made for the displacement of faculty members for financial exigency). WIS. STAT. ANN. §§37.31 (1) (a), (b) (Supp. 1974).

[49] This duty exists both in financial exigency and discontinuance of programs or departments cases.

[50] 527 F.2d 843 (D.C. Cir. 1975).

Court of Appeals enforced that duty, arising from the employment contract which included the AAUP regulations, and held:

> The University did discontinue Browzin's program of instruction. It was therefore under an obligation to make every effort to find him another suitable position in the institution.[51]

Unanswered questions remain as to what constitutes a "program"; for example, if a line of courses is phased out such as nuclear physics, is that sufficient to justify termination?[52] In sum, the state is not restricted by tenure in its ability to restructure programs which causes displacement of tenured faculty except to the extent the institution may be obligated to help cushion the effects and be called upon in open hearing to justify its policy.

5. Validity of Tenure Contracts

Once deciding that a contract for tenure may be formed, the question arises whether such contracts are supported by sufficient legal consideration to be *valid* and enforceable. Issues of contract law involving the legal consideration questions revolve about the indefiniteness of the duration and compensation of the contract, the apparent lack of mutuality of obligation, and whether a contract for tenure under usual contract law principles is a contract for permanent employment which may be invalid because of lack of consideration. Though this is largely an untested issue in tenure contracts in higher education, some case law is available to generalize as to the validity of such agreements.[53]

A summary of contract law outside the area of higher education finds:

> Ordinarily, an employment agreement which mentions no period of duration, and is in a true sense made indefinite thereby, will be construed as being terminable at will by either party, and the burden of proving the contrary must be assumed by the party asserting that the employment was for a definite period.[54]

However many courts will not find such agreements unenforceable due to lack of mutuality or indefiniteness where the intent of the parties as to duration is ascertainable from the agreement, custom and usage, and the nature of the employment.[55] The Supreme Court has upheld the validity of such agreements stating that they are not against public policy.[56] Also courts have found that where consideration is given additional to the usual services to be performed, it will enforce permanent duration agreements.[57] For exam-

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[51] *Id.* at 849.

[52] The regulation states that the decision to discontinue a program should be based "essentially upon educational considerations" and an explanatory note points out that this term is not intended to include "cyclical or temporary variations in enrollment." Regulation 4 (d) (1), 62 AAUP BULL. 17, 19 (1976).

[53] *See generally* Annot., 60 A.L.R. 3d 226 (1974).

[54] *Id.* at 232, n.10.

[55] *Id.; see* A. CORBIN, CONTRACTS §96 (1963).

[56] Pierce v. Tennessee C.I. & R. Co., 173 U.S. 1 (1899). *See also* Littrell v. Evening Star Newspaper, 120 F.2d 36 (D.C. Cir. 1941).

[57] *See, e.g.*, Baltimore & O.R. Co. v. Foar, 84 F.2d 67 (7th Cir. 1936).

ple, in *Simmons v. California Institute of Technology*[58] a contract for permanent employment supported by consideration additional to the services incident to the employment was upheld for as long as the employer remains in business and the employee is able and willing to do his work satisfactorily. Some courts have suggested that additional consideration is not necessary to support a contract for permanent employment:

> If it is their purpose, parties may enter into a contract for permanent employment—not terminable except pursuant to its express terms—by stating clearly their intention to do so, even though no other consideration than services to be performed is expected by the employer or promised by the employee.[59]

Cases arising in higher education that have addressed the question are few but for the most part contracts of tenure have been upheld. It is perhaps instructive to note that in recent years very few cases[60] have questioned the enforceability of tenure for want of sufficient consideration.[61] This, in part, could be due to the fact the purpose of the parties in granting "permanent" employment, though atypical in non-educational settings, is the norm in higher education and is clearly intended and stated as institutional policy which is incorporated by reference into the employment agreement. The purpose or rationale for this type of contractual provision, as discussed earlier, is not only to provide job security but also to protect academic freedom. The recent case in New Jersey, *Bloomfield College*,[62] in discussing the purpose of academic tenure went on to observe that although no assurance of life employment accrues with tenure, once it has been attained

> "it denotes clearly defined limitations upon the institution's power to terminate the teacher's services."[63]

One recent lower state court decision in Iowa has held that agreements for tenure without additional consideration are unenforceable.[64] In a second case in Iowa, *Collins v. Parsons College*,[65] the state Supreme Court enforced a tenure provision finding that the relinquishment of a tenure contract elsewhere in exchange for the new tenure contract was sufficient additional consideration. Though the issue of the absence of mutuality of obligation was raised in that the professor unlike the university, could terminate his employment at the end of any academic year, the court found it was unnecessary to decide on that basis since *other* consideration was present. The court on that issue however did observe:

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[58] 194 P.2d 521 (1948), *Phg.*, 34 Cal. 2d 264, 209 P.2d 581 (1949).

[59] Littrell v. Evening Star Newspaper Co., *supra* note 56, at 36; and *see*, Eilen v. Tappan's Inc., 16 N.J. Super. 53, 83 A.2d 817 (1951).

[60] *See, e.g.*, Lumpert v. University of Dubuque, *supra* note 47.

[61] *See, e.g.*, Bruno v. Detroit Institute of Technology, *supra* note 18; Rhine v. International YMCA College, 339 Mass. 610, 162 N.E. 2d 56 (1956); State *ex rel.* Keeney v. Ayers, 108 Mont. 547, 92 P.2d 306 (1939).

[62] 129 N.J. Super. 249, 322 A.2d 846 (1974); *aff'd*, 346 A.2d 615 (App. Div. 1975).

[63] *Id.* at 853.

[64] Lumpert v. University of Dubuque, *supra* note 47.

[65] 203 N.W. 2d 594 (1973).

> We have considerable doubt that an agreement for tenure such as this one requires mutuality in any event, as to *duration of the employment.* Tenured teachers in institutions of higher learning have permanent positions as spelled out in the bylaws of their institutions, just as civil servants have permanent positions as spelled out in statutes. Yet such teachers and servants are free to resign if they wish. . . . Promises must be mutually obligatory if they constitute the only consideration for each other. But if a promise is supported by other consideration, it is enforceable although the promisee has the right to terminate his undertaking or indeed makes no promise at all, as is the case of unilateral contracts.[66]

The court in restating principles of contract law continued that although lack of mutuality may amount to a lack of consideration, the mere lack of mutuality itself does not render a contract invalid.

> If mutual promises be the mutual consideration of a contract, then each promise must be enforceable in order to render the other enforceable. Though consideration is essential to the validity of the contract, it is not essential that such consideration consist of a mutual promise. . . . This is true of all unilateral contracts which are supported by consideration.[67]

The issue then becomes whether consideration exists to support the agreement. Consideration has been defined many ways including consisting of a detriment to promisee,[68] which detriment does need to move to the promisor.[69] An increasing number of courts have come to recognize that the doctrine of promissory estoppel as a substituted form of consideration, where consideration would be otherwise lacking.[70] The dominant element which must be present under the doctrine is that of justifiable detrimental reliance on the promise, which if present may preclude the promisor from asserting the lack of consideration.

Unanswered and untested issues remain in higher education on those issues. Whether no special consideration (other than providing services) is necessary or whether the implicit surrender of potential job opportunities by acceptance of a tenured position at an institution would satisfy the consideration requirement is a matter left to future litigation under each state's contract law. It has been decided, at least in Iowa, that a clearly bargained for exchange of a tenured position at one institution will support a contract for tenure at another institution,[71] although other courts have had different approaches on that issue.[72] Whether courts will accept the promissory

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[66] *Id.* at 598.

[67] *Id.*

[68] 17 AM. JUR. 2d *Contracts* §96 at 438 (1964); 17 C.J.S. *Contracts* §70 at 747 (1963).

[69] RESTATEMENT OF CONTRACTS §75, Comment e (1932).

[70] *See* Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); *see, e.g.,* RESTATEMENT OF CONTRACTS 2d §90 (Tentative Draft Nos. 1–7, 1973) Seavey, *Reliance Upon Gratuitous Promises or Other Conduct,* 64 HARV. L. REV. 913 (1951).

[71] Collins v. Parsons College, *supra* note 23.

[72] 53 AM. JUR. 2d *Master & Servant* §33 at 108–109 (1970); 56 C.J.S. *Master & Servant* §6 at 64, 70–71 (1948); Annot., 135 A.L.R. 646, 669–673 (1941).

estoppel doctrine as a substituted form of consideration or will continue to bypass the issue as unnecessary for discussion remains to be seen.[73]

6. *Issues Affecting Enforceability*

Other contract issues which could arise and affect the enforceability of tenure contracts include (1) lack of authority of university officials to enter into such contracts because of either constitutional or statutory limitations; (2) contractual waiver of rights; (3) statute of frauds in the case of informal oral tenure plans; and possibly (4) the contract doctrine of the parol evidence rule, a contract law doctrine which may preclude evidence of a tenured position if the employment contract is silent on it.

Constitutional limitations on the university's authority may arise from two sources: (1) the contract clause in the U. S. constitution[74] which prohibits states from impairing contract obligations it has entered into, and (2) a state constitution's reservation of "full control" which may prohibit delegation of that authority. The Supreme Court in *Indiana ex rel Anderson v. Brand*[75] held that an Indiana Statute which created contractual tenure rights in teachers could not be subsequently abrogated by legislation negating tenure rights in that it unconstitutionally impaired the obligation of the originally entered into tenure contracts. The Court admitted that every contract is made subject to the implied condition that its fulfillment may be validly frustrated by a proper exercise of the police power.[76] The dissent argued that the Indiana legislature remained free to change its legislative policy over educational matters, since such power was reserved by the State Constitution, and that teachers' tenure rights were *statutory* and not *contractual* rights and were thus repealable.[77]

A more common situation is where the state constitution is found to reserve to the legislature the power to change, modify or abolish policies relating to schools. For example in *Malone v. Hayden* the Supreme Court of Pennsylvania found that teachers' contracts impliedly incorporated the constitutional requirement that permitted the subsequent legislative modification of the state tenure law and thus modification of the tenure contract was not impermissible.[78] In summary, whether the Constitution will preclude modification of contracts for tenure depends wholly on judicial interpretations of state constitutions and pertinent state statutes and therefore does not lend itself to generalization.

A second potential source of limitation on a university's authority to grant tenure may be found in a constitutional restriction which may limit the power

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[73] *See generally*, J. CALAMARI & J. PERILLO, CONTRACTS 180–187 (1970), for development of modern trends of this doctrine.

[74] U.S. CONST. art. I, §10.

[75] 303 U.S. 95 (1938).

[76] *Id.* at 109; *see* State *ex rel.* Keeney v. Ayers, *supra* note 61, at 311.

[77] 303 U.S. 95, 112–113 (1938). The Court had held previously that a statutory tenure system in New Jersey could be altered by subsequent legislation. Phelps v. Bd. of Educ., 302 U.S. 74 (1937).

[78] 329 Pa. 213, 197 A. 344, 353 (1937).

to delegate such authority. For example in *Worzella v. Board of Regents*,[79] the Supreme Court of South Dakota invalidated a tenure plan on the basis it improperly restricted the board's constitutionally granted power to maintain the college "under the control of" the board.[80] The court viewed the board's constitutional power of removal of faculty as absolute and thus not susceptible of restriction by the tenure system.[81] However, the doctrine of illegal delegation to a great degree in recent years has been ameliorated by courts finding that public entities generally have broad authority to delegate matters which in earlier years would have been viewed as improper interference with the sovereign powers of the state.[82]

Statutory limitations may also affect the enforceability of tenure contracts. A clear limitation would be statutes which authorize universities to remove personnel "at will". While some courts have held that tenure and related personnel policies are restricted by such statutes,[83] others have held that having to comply with reasonable restrictions, such as following certain procedures in the removal process, does not impair the authority of the governing board and is not therefore prohibited by such statues.[84] This latter interpretation permits an aggrieved faculty member to sue for breach of contract while at the same time reserving to the governing board the ultimate power to dismiss.

Another potential statutory obstacle to enforcement of tenure contracts is whether a university may enter into such agreements absent explicit statutory authorization. To do so a university would be acting on authority implied from general, explicit statutory authorization such as "the authority to enter into employment contracts with faculty" and to "make and enforce rules and regulations." Early case law demonstrates judicial conservatism on this issue and implied powers often were not found; however in recent years a discernible trend of case law has emerged which makes it not unlikely that implied authority would be found to support such contracts including those for tenure.[85]

The contract doctrine of waiver may be introduced into the discussion regarding the legal enforceability of tenure contracts. A waiver is defined as a relinquishment of a known right and can arise in tenure contracts in a couple of ways.[86] First a professor who is granted a tenure contract other than by explicit statutory provision may commonly be provided only a one year con-

[79] 77 S.D. 447, 93 N.W. 2d 411 (1958). *But see* Byse, *Academic Freedom, Tenure, and the Law: A Comment on Worzella v. Board of Regents*, 73 HARV. L. REV. 304 (1959).

[80] Worzella v. Bd. of Regents, *id* at 413.

[81] A similar holding was rendered in the sister-state of North Dakota. Posin v. State Bd. of Higher Educ., 86 N.W. 2d 31 (N.D. 1957).

[82] *See, e.g.*, Norwalk Teachers' Assoc. v. Bd. of Educ., 138 Conn. 269 82 A.2d 624 (1951); an illustration of the older view is found in City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W. 2d 539 (1947).

[83] *See* state *ex rel.* Hunsicker v. Bd. of Regents, 209 Wis. 83, 244 N.W. 618 (1932); Hyslop v. Bd. of Regents, 23 Idaho 341, 129 P.1073 (1913).

[84] *See, e.g.*, State Bd. of Agriculture v. Meyers, 20 Colo. App. 139, 77 P.372 (1904).

[85] *See, e.g.*, Dayton Classroom Teachers Ass'n. v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E. 2d 714 (1975); *see also* Batchellor v. Commonwealth, 176 Va. 109, 105 S.E. 529 (1940).

[86] For a discussion of waiver, *see* State *ex rel.* Keeney v. Ayers, *supra* note 61, at 310.

tract. The question can arise whether the acceptance of a one year contract is a waiver of the right to "permanent duration employment" provided by tenure. Few courts have addressed this specific issue but one such court was the Supreme Court of Iowa which in upholding the enforceability of a tenure contract held that the professor " . . . did not waive his right of tenure by executing written contracts carrying out the original agreement in individual years."[87] Even where such one year agreements did not specify continued tenure rights, the earlier discussion regarding the implied incorporation by reference of university regulations granting tenure rights should lead one to conclude that the waiver argument is largely ineffectual.

The waiver argument, which can also preclude inconsistent positions, may arise where a university indicates satisfaction or lack of dissatisfaction with a professor's work. For example in *Bruno v. Detroit Institute of Technology*[88] where tenure was to be awarded following a prescribed period, a combination of factors including the failure to properly notify the professor of an adverse tenure decision, renewal of yearly contracts, a promotion, and lack of criticism regarding his performance caused the court to award tenure and preclude the university from taking an inconsistent position. Though this type of case (which is to some extent entangled with statutory mandates) does not present the clear cut issue of whether a university which offers or awards tenure if certain criteria are met may thereafter change its position where there has been reliance on the continuance of the system, it at least suggests the possible availability of such argument.[89]

Related to the waiver argument is the earlier discussed doctrine of promissory estoppel which may provide consideration either to create an enforceable contract or to make an offer irrevocable.[90] Thus in the context of higher education it may be that the offer of an institution to grant tenure or the actual awarding of tenure makes the offer irrevocable where the professor reasonably relies on it. Professor Corbin in his treatise on contracts has observed:

> Where one party makes a promissory offer in such a form that it can be accepted by the rendition of the performance that it accepted in exchange . . . the offeror is bound by a contract just as soon as the offeree has rendered a substantial part of the that requested performance.[91]

Though there appears to be no cases in higher education on tenure contracts which raise this issue, the analogy is obvious. A university by awarding tenure to a professor promises to honor its offer for continued employment if

[87] *Id.;* Collins v. Parsons College, *supra* note 23.

[88] 51 Mich. App. 593, 215 N.W. 2d 745 (1974).

[89] The question of whether application of such a doctrine would in fact vest contract rights so as to preclude a university from later changing its policy vis-á-vis that faculty member is discussed *supra*, in text accompanying notes 34–38.

[90] *See*, RESTATEMENT OF CONTRACTS 2d §§45 and 24 A (Tentative Draft Nos. 1–7 1973). It has also been held that since a "unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract." Chrisman v. S. Cal. Edison Co., 83 Cal. App. 249, 256 P.618, 621 (1927); *see also* Oliver v. Wyatt, 418 S.W. 2d 403 (Ky. Ct. App. 1967).

[91] 1 A. CORBIN, CONTRACTS §49 at 187 (1963).

the professor meets the job requirements; the professor's continued reliance on this offer creates an irrevocable offer that can be subsequently accepted by the professor.[92]

A third area of contract law which could affect the enforceability of tenure contracts deals with the statute of frauds and parol evidence rule. The statute of frauds of each state generally requires certain types of contracts to be written; for example, those not capable of performance within a year from the time of their formation (such as "permanent employment" contacts).[93] Thus, a university's informal *oral* tenure policy may not comply with the statute and be unenforceable.[94] However, the modern trend of cases finds that contracts based on one's "life" are capable of preformance within one year inasmuch as the contingency might become effective in less than a year.[95] As most contracts for tenure are written either expressly or through incorporating by reference the pertinent handbook provisions, there would seem to be few legal problems involving tenure with the statute of frauds.[96]

The parol evidence rule of contract law precludes admission of evidence of prior oral understandings which contradict a subsequent written agreement which is fully integrated.[97] The application of the rule could arise where an oral promise of tenure was followed by a later written contract of employment that omitted such a provision. Whether evidence of the earlier alleged oral agreement would be admissible depends on the court's view of whether the written agreement was so fully integrated vis-à-vis the terms and conditions of employment that it would likely have been included in the agreement. It is most likely that the court will find that the fully integrated agreement includes the handbook regulations which will incorporate by reference the tenure provisions. If on the contrary the court finds the agreement is fully integrated, the evidence will be excluded. However, even if a court would exclude such evidence, it is possible that it could come in through the process of interpreting the meaning of the agreement.[98] Thus far this issue has not been raised as a troublesome one in tenure contracts in higher education.

7. *Contract Remedies for Breach of Tenure Contract*

A final element important to considering the legal ramifications of contracts for tenure involves the legal remedy which the court will award in the event a breach of contract is found. The traditional contract rule in employment contracts is to award damages rather than specific performance except

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[92] This also might present an argument in favor of the "vesting" of contract rights to tenure.

[93] 60 A.L.R. 3d 317 §16.

[94] Brookfield v. Drury College, 139 Mo. App. 339, 123 S.W. 86 (1909).

[95] *See, e.g.,* McGehee v. South Carolina Power Co., 187 S.C. 79, 196 S.E. 538 (1938); Dow v. Shoe Corp. of America, 276 F.2d 165 (7th Cir. 1960).

[96] However, even incorporation by reference can involve statute of fraud problems when there is a question of which documents among several are to be included in the final agreement and constitute a writing sufficient to take it outside the applicability of the statute. *See, e.g.,* Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 110 N.E. 2d 551 (1953).

[97] *See* Murray, *The Parole Evidence Rule: A Clarification*, 4 DUQUESNE L. REV. 337 (1966).

[98] *See* Corbin, *The Interpretation of Words and the Parole Evidence Rule*, 50 CORNELL L. Q. 161 (1965).

the unusual case where damages can be proved inadequate.[99] The rationale is to avoid forcing an employer and employee into an incompatible relationship. In higher education cases the rule is the same with damages normally being awarded, which in case of a breach of a tenure contract can be considerable.[100] In *Bruno*[101] the court found a breach of a contract for tenure and after listing how to measure the future damages including anticipated salary commented:

> We feel we would be remiss if we did not hasten to add that the entire problem of future damages could be avoided if defendant were now willing to abide by its contractual obligation and again allow plaintiff to return to his teaching post.[102]

There has been continued dissatisfaction expressed about the unavailability of specific performance in the enforcement of employment agreements in that damages are rarely adequate due to the disruptive effect a discharge has on one's reputation and future job opportunities and the fact that professors are usually quite autonomous and thus do not run afoul of the usual rule seeking to avoid incompatibility in the employment relationship.[103] Williston in his treatise on contracts has likewise observed " . . . appealing factual situations may occasionally induce a court to enforce a personal service contract specifically, particularly in the absence of any personal relationship between the parties."[104] Some recent court cases have likewise expressed dissatisfaction and have awarded reinstatement. For example in the *Bloomfield College* case the court made an exception to the general rule and ordered reinstatement where the university had failed to follow its own regulations in dismissing for "financial exigency." Arguably this case is distinguishable since there apparently was no dissatisfaction with services and thus reinstatement would not involve the incompatibility problem. The court stated that specific performance should not be precluded, and noted that

> . . . no reason appears as to why reinstatement cannot be ordered here as has been done so often in the numerous cases involving public educational institutions.[105]

The court pointed out that although those orders for reinstatement derived mainly from statutory provisions coupled with the court's power to issue writs of *mandamus*.

> the substance of the action has been nothing more than to compel adherence to academic tenure commitments on the part of an educational institution. This is the route by which specific performance is obtained against a state body on the basis of contracts arising from statute.[106]

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[99] 11 J. WILLISTON, CONTRACTS §1450 (3d ed. 1968); 5A A CORBIN CONTRACTS §1204 (1964); and applied in Greene v. Howard Univ., 271 F. Supp. 609, 615 (D.C. Cir. 1967), remanded for proof for damages in 412 F.2d 1128 (D.C. Cir. 1969).

[100] *See* Bruno v. Detroit Inst. of Tech., *supra* note 18, at 749.

[101] *Id.* at 750.

[102] *Id.*

[103] *See generally*, Comment, *Academic Tenure: The Search for Standards*, 39 S. CAL. L. REV. 593 (1966).

[104] 11 J. WILLISTON, CONTRACTS §1124 at 786-787 (1968).

[105] AAUP v. Bloomfield College, *supra* note 7. An additional argument that the lack of mutuality of remedy precludes specific performance has been largely discredited. 5 A CORBIN, CONTRACTS, §1180 at 331.

[106] AAUP v. Bloomfield College, *supra* note 7.

The reviewing court in affirming the granting of specific performance added:

> In view of the uncertainty in admeasuring (sic) damages because of the indefinite duration of the contract and the importance of the status of plaintiffs in the milieu of the college teaching profession it is evident that the remedy of damages at law would not be complete or adequate. . . . The relief granted herein is appropriate to achieve equity and justice.[107]

In public universities, an improperly terminated tenured professor may be entitled to reinstatement pursuant to a statutory provision.[108] And even absent a statutory provision, professors have been ordered reinstated.[109] Though most cases arising in higher education have denied specific performance, one should not overlook the potential availability of such a remedy (especially where damages can be argued to be inadequate) and of the wide discretion available to courts in devising and shaping the remedy so as to fit the changing circumstances of every case in an attempt to render the parties whole.

II. TENURE IN CONSTITUTIONAL CONTEXT

A. Academic Freedom

The grant of tenure in addition to contributing to job stability is provided to ensure adequate protection of *academic freedom* which encompasses the ideal of virtually unrestricted freedom of intellectual thought, learning, and teaching. The D. C. Court of Appeals in a recent case dealing with the rights of a tenured professor noted that a tenure system is designed to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits and to foster society's interest in the unfettered progress of research and learning by protecting the profession's freedom of inquiry and instruction.[110]

Judge Wright further elaborated on the need to protect such interests:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made....Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[111]

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[107] *Id.* at 618.

[108] *See* Matheson, *Judicial Enforcement of Academic Tenure: An Examination*, 50 WASHINGTON L. REV. 597, 603 (1975).

[109] *Cf.* Pima College v. Sinclair, 17 Ariz. App. 213, 216, 496 P.2d 639, 641 (1972); and State *ex rel.* Keeney v. Ayers, *supra* note 61.

[110] Browzin v. Catholic University of America, *supra* note 25.

[111] *Id.* at 846 n.2.

As significant as academic freedom is in our American tradition, no court has squarely held that academic freedom is a distinct and legally enforceable independent right absent and beyond constitutional guarantees.[112] The question arises then to what extent do constitutional guarantees protect the same values and rights that tenure is designed to protect?

B. Constitutional Rights of Faculty absent Tenure Rights

1. Substantive Rights Under the Constitution

To begin, it must be understood that the constitution regulates only public universities and those private institutions that have become significantly involved in governmental action, which under legal analysis, will apply the constitution through the doctrine of "state action."[113] Under the fourteenth amendment there are two types of rights protected, substantive, such as first amendment rights, and procedural, such as due process-fair hearing rights. For the most part, courts deciding cases in higher education have deferred to internal academic judgments and have emphasized interest in proper procedures as opposed to substantive rights, with protection accorded the latter primarily in the areas of extracurricular speech and right of association.[114]

The courts, however, have not been unmindful of trying to protect where possible some of the same interests protected by academic freedom. For example, the Supreme Court has ruled:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to teachers concerned. That freedom is, therefore, a specific concern of the first amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[115]

Proceeding from that dictum, the Supreme Court has also made it clear that *professors at public universities have constitutionally guaranteed rights regardless of a tenured or untenured status.* (Of course such rights must be vindicated in judicial proceedings rather than in institutional "cause" hearings by a jury of academic peers.) The only question then is whether legal constitutional rights encompass the non-legal interests of academic freedom. The leading case dealing with *extracurricular* free speech rights is *Pickering v. Board of Education* where the Court ruled that the Board in dismissing a teacher for publicly criticizing the Board's handling of revenue raising proposals was an unconstitutional interference with the teacher's freedom of

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[112] *See* Miller, *Teacher's Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837 (1974); and K. ALEXANDER & E. SOLOMON, COLLEGE AND UNIVERSITY LAW 342 (Michie. 1972). It is possible of course that a university regulation requiring academic freedom would be viewed as part of the employment contract and enforced on that basis.

[113] *See* Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323 (1970). *Academic Freedom*, 81 HARV. L. REV. 1045, 1056 (1968).

[114] *See generally Academic Freedom*, 81 HARV. L. REV. 1045, 1051 (1968); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L. J. 841 (1970).

[115] Perry v. Sindermann, 408 U.S. 593, 598 (1972).

speech.[116] The Court did recognize the interests of the state as employer in regulating the speech of the citizenry in general and established a "balancing test" between the two interests.

The courts have since tried to find the line that separates the two interests. In *Pickering* the Court noted that if a teacher's utterances were so without foundation as to call into question the person's fitness to perform his duties in the classroom, then the statement's "would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.[117] Subsequent court rulings have narrowed the scope of protection by holding that where honest doubt exists whether adverse action was taken because of questions of competency rather than protected constitutional rights the court should rule in favor of the former. For example an Arizona court held:

> [I]f, judged by constitutional standards, there are valid as well as invalid reasons for the discipline or discharge of a teacher, such discipline or discharge will not be set aside by the federal court so long as the invalid reasons are not the primary reasons or motivation for the discharge.[118]

In 1977 the Supreme Court in *Mt. Healthy City School District v. Doyle*[119] rendered a far reaching decision in broadening the above rationale. It found that a dismissal may be proper even where a "motivating factor" in the dismissal was the teacher's exercise of conduct which is constitutionally protected. Under such circumstances, the employer may still discharge the employee if it can show

> . . . by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[120]

The Court explained its rationale by pointing out that while it wished to protect against the invasion of constitutional rights, it wanted to do so "without commanding undesireable consequences not necessary to the assurance of those rights."[121]

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[116] 391 U.S. 563 (1968). For further discussion of developments, see Note, *Judicial Protection of Teachers' Speech: The Aftermath of Pickering*, 59 IOWA L. REV. 1256 (1974).

[117] Pickering v. Bd. of Educ., 391 U.S. 563, 573 n.5 (1968).

[118] Starsky v. Williams, 353 F. Supp. 900, 916 (D. Ariz. 1972). *See also*. Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1972); Rampev v. Allen 501 F.2d 1090 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 827 (1975).

[119] 97 S. Ct. 568.

[120] *Id.* at 576. A difficult case to resolve in the past is where the exercise of constitutionally protected speech by a teacher may interfere with effective classroom performance. For example, if a teacher uttered racial slurs outside the classroom which caused adverse student reaction resulting in poor performance ratings, is this not the type of overriding state interest discussed in the *Pickering* case? It would seem that in view of the holding in *Mt. Healthy*, *supra*, note 119, the school's interest and burden balanced against the individual's interests may become easier to prove.

[121] *Id.* That is to say it wanted to avoid the situation where an employee could be placed in "a better position as a result of the exercise of constitutionally protected conduct than he would have had he done nothing." Id. at 575.

In the area of constitutional rights *inside the classroom,* a critical part of academic freedom, the court decisions are varied but one commentator has taken the position that recent court decisions

> . . . carve an area of autonomy in the classroom in which teachers teach free of interference from school authorities and parent alike, so long as the teachers can convince a federal court [rather than in a university proceeding] that the classroom expression is relevant to their curricular assignment, is balanced and has educational value.[122]

The Supreme Court in *Tinker v. Des Moines Independent Community School District*[123] in applying a test balancing the rights of the individual against the institutional needs of the orderly operation of a school, found that wearing armbands was not such an interference as to be disruptive. A sampling of judicial decisions balancing the relative interests finds that courts have permitted and protected freedom of speech inside the classroom,[124] the teachers selection of subject matter in teaching a course,[125] and in using teaching methods which were not universally approved but which were not explicitly prohibited.[126] On the other hand it is perfectly clear that a state has the "undoubted right to prescribe the curriculum for its public schools"[127] and the concept of academic freedom does not insulate a teacher from review by superiors on the basis of teaching style.[128]

Reinstatement as a remedy available to professors who have been improperly dismissed has long been used by the courts[129] and the reluctance to order specific permforance in the employment context prevalent in contract law principles is not in evidence. In fact, the Fifth Circuit, in upholding reinstatement as the appropriate remedy, stated that "[e]nforcement of constitutional rights frequently has disturbing consequences. Relief is not restricted to that which will be pleasing and free of irritation."[130] An addi-

[122] Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV.

[123] 393 U.S. 503 (1969).

[124] Kaprelian v. Texas Woman's Univ., 509 F.2d 133, 139 (5th Cir. 1975); James v. Bd. of Educ., 385 F. Supp. 209, 211 (W.D. N.Y. 1974).

[125] Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Paducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).

[126] Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971); for full discussion *see* lower court opinion 323 F. Supp. 1387 (D. Mass. 1971). For cases dealing with "vague" prohibitions *see, e.g.*, Doughtery v. Walker, 349 F. Supp. 629 (W.D. Mo. 1972).

[127] Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

[128] *See, e.g.*, Hetrick v. Martin, 480 F.2d 705, 709 (6th Cir. 1973).

[129] Statutory rights to reinstatement usually comes from 42 U.S.C. §1983 (1970) which provides for a remedy "in an action at law, suit in equity, or other proper proceeding" for state action resulting in "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *See generally*, Griffis and Wilson, *Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract*, 25 BAYLOR L. REV. 549 (1973); Note, *Economically Necessitated Faculty Dismissals as a Limitation on Academic Freedom*, 52 DENVER L. REV. 911, 917 (1975).

[130] Sterzing v. Fort Bend Indep. School Dist., 496 F.2d 92 (5th Cir. 1974). This was an obvious reference and contrast to the usual employment contract principles refusing specific performance because it would tend to antagonize the parties in their employment relationship.

tional remedy is that of mandamus where an improper dismissal also contravenes a statutory directive. In granting reinstatement in one such case, a California court has held that since a statute directed reinstatement, a teacher discharged for exercising protected constitutional rights must be reinstated to avoid the "chilling" effect that could occur absent the ordering of that remedy.[131]

In summary, the non-legal definition of academic freedom, accepted by most universities, encompasses (1) research and publication; (2) freedom in the classroom; and (3) freedom as a citizen. As can be seen in the above analysis, there has been some legal protection afforded professors in each area. Though it is tempting to note that constitutional rights are guaranteed professors at public universities whether or not they are tenured and thereupon conclude that these guarantees protect all of the same interests guarded by the doctrine of academic freedom, an objective appraisal might better conclude that though there may be a trend in that direction there are obviously too few cases to categorically so conclude. An additional consideration is that absent institutionally—provided procedures within which to judge academic freedom cases, the only recourse available to the university and professor, absent a settlement, is to litigate in federal court.

2. Procedural Due Process under the Constitution

It is sometimes suggested that tenure with its requirement of a fair hearing has become passé in view of the availability of constitutionally required due process hearings. Though to some extent, for some public employees, this may be accurate, a brief legal examination of the requisite standards to be met to trigger a right to constitutional due process demonstrates that a very large percentage of faculty members are not entitled to this procedural protection.

a. Protected Interests

In 1972 the Supreme Court in *Board of Regents v. Roth*[132] and *Perry v. Sindermann*[133] established standards and guidelines under which faculty members at public institutions are entitled to procedural due process if their termination adversely affects a "liberty" or "property" interest under the fourteenth amendment to the United States Constitution. The Court further defined a *property* interest as follows.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[134]
>
> . . . Property interests, of course are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or understand-

[131] Monroe v. Trustees of the California State Colleges, 6 Cal. 3d 399, 99 Cal. Rptr. 129, 491 P.2d 1105 (1971). *See also*, Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 DUKE L. J. 207.

[132] 408 U.S. 564 (1972).

[133] 408 U.S. 593 (1972).

[134] Bd. of Regents v. Roth, *supra* note 21.

> ings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlements to those benfits.[135]

In applying that criteria to the cases at hand the court found that Professor Roth, having only a one year appointment, had absolutely no interest in re-employment for the next year. Neither was there a "state statute or University rule of policy that secured his interest in employment"; *thus, he was* found not to have a *property* interest sufficient to entitle him to a due process hearing prior to his non-renewal.[136] In *Sindermann*, where the institution fostered an "understanding" of tenure rights during the years of the professor's employment, the Court found that the existence of rights under an implied-in-fact tenure system (even in the face of formal disclaimer of a tenure system) would be a sufficient property interest in continued employment to support a claim for due process protection.[137]

The "liberty" interest as defined in *Roth,* would be adversely affected, thus triggering a right to procedural due process, if a termination were based on a charge of "dishonesty", immorality, or where

> a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, or where the state, in declining to re-employ him . . . imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.[138]

The Supreme Court in *Roth* in applying that criteria found that the failure to renew a nontenured professor's contract by itself did not adversely affect a "liberty" interest. The Court stated that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another."[139]

The interpretive definitions of these constitutional terms although somewhat abstract become less so as they take on additional meaning when applied to individual cases. A sampling of decisional holdings interpreting "liberty" and "property" will illustrate.

"Property" interests sufficient to invoke constitutional due process protection have been found in the following types of cases: by virtue of holding a *tenured* position,[140] explicitly or impliedly,[141] or a term contract,[142] and due to *substantial* longevity of service either alone or coupled with other factors fostering legitimate expectations to re-employment.[143] On the other hand,

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[135] *Id.*

[136] *Id.* at 578.

[137] Perry v. Sinderman, *supra* note 20.

[138] Bd. of Regents v. Roth, *supra* note 21.

[139] *Id.* at 575.

[140] Wagner v. Elizabeth City Bd. of Educ., 496 S.W. 2d 468 (Tex. 1973); Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974); Univ. of Alaska v. Chauvin, 521 P.2d 1234, 1238 (Alas. 1974).

[141] Perry v. Sinderman, *supra* note 20, at 602.

[142] Bd. of Regents v. Roth, *supra* note 21, at 576.

[143] Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Blunt v. Marion Cnty. Sch. Bd., 515 F.2d 951 (5th Cir. 1975); Zimmerman v. Spencer, 485 F.2d 176 (5th Cir. 1973); Scheelhaase v. Woodbury Central Community Sch. Dist., 488 F.2d 237 (8th Cir. 1973); Soni v. Bd. of Trustees of Univ. of Tenn., 513 F.2d 347 (6th Cir. 1975).

Roth is usually interpreted to represent the general rule that *nontenured professors have no property interest in continued employment* and thus no right to a due process hearing.[144] The length of service of a nontenured professor typically is found inconsequential; for example, no property interests were found where nonrenewal occurred after one year service where tenure was acquireable after four years,[145] or five years,[146] or after four years of a five year probationary period.[147] As has been stated, the relevant source as to whether a property interests exists in the employment relationship is most often found in pertinent state law relating to the reasonable expectancy of entitlement to reemployent.[148] This principle is illustrated, albeit by somewhat strained analysis, in *Bishop v. Wood,*[149] a 1976 case where the Supreme Court found that a municipal ordinance classifying an employee as "permanent" under pertinent state law was intended to mean "terminable at will" and thus forced the conclusion that no property interest existed so as to require a due process hearing. It is doubtful whether such a result is likely under a tenure contract where by definition one is presumed continually employed *until cause is shown* and proved by the employer. Of course the pertinent state law creating the rights in the tenure contact must be closely examined to ascertain whether the usual definition of tenure is intended or whether it was meant to be more closely analogous to the "permanent" status of a civil servant under a North Carolina type of civil service system where it was meant only as a descriptive rather than as a rights-granting status. In sum, it is clear that untenured professors have little expectation of being constitutionally entitled to a due process hearing upon their nonrenewal on the basis of possessing a "property" interest.

Illustrations of "liberty" interests that courts have found sufficient to invoke due process protection are as follows. A "stigma" or an adverse effect on one's reputation or integrity was created which would foreclose future employment opportunities where termination or nonrenewal was based on failure to undergo psychiatric exam when so ordered,[150] a charge of mental illness,[151] a "racist" charge,[152] removal was by unconventional means with attendant damaging publicity,[153] injury to reputation occurred by an abrupt

[144] Scheelhaase v. Woodbury Central Comm. Sch. Dist., *Id. See also*, Bd. of Regents v. Roth, *supra* note 21, which held that a violation of first amendment rights does not give one a right to a due process hearing.

[145] Seitz v. Clark, 524 F.2d 876 (9th Cir. 1975).

[146] Blair v. Bd. of Regents of State Univ. and Comm. College System, Tenn., 496 F.2d 322 (6th Cir. 1974); Buhr v. Buffalo Pub. Sch. Dist., 509 F.2d 1196 (8th Cir. 1974).

[147] Sheppard v. W. Va. Bd. of Regents, 516 F.2d 826 (4th Cir. 1975).

[148] Perry v. Sindermann, *supra* note 20, at 601.

[149] 43 U.S.L.W. 4820 (1975). In 1974 in Arnett v. Kennedy, a plurality of the Court found that a hearing procedure provided by the government did not in and of itself create a property interest. 416 U.S. 134, 163 (1974). However, a majority of the Justices found that the facts showed the existence of a property interest.

[150] Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973).

[151] Lombard v. Bd. of Educ. of City of New York, 502 F.2d 631 (2d Cir. 1974).

[152] Wellner v. Minnesota State Junior College Board, 487 F.2d 153 (8th Cir. 1973).

[153] Zumwalt v. Trustees of Cal. State Colleges, *supra* note 7.; Merritt v. Consol. Sch. Dist. No. 8, Rio Grande County, 522 P.2d 137 (Colo. 1974).

termination of an employee of substantial longevity,[154] and by charges of fraud[155] and untruthfulness.[156] On the other hand judicial interpretations have found that the "liberty" interest is not adversely affected where one is simply not rehired in one job and remains free to seek another,[157] or charged with failure to be compatible with students, other employees, and members of the community,[158] as "anti-establishment,"[159] or charges of minor inadequacies such as tardiness[160] or even of inadequate performance.[161] In *Bishop* v. *Wood*[162] the Supreme Court in a 5–4 decision held that where "the reasons were never made public" there could be no basis for claiming an invasion of the liberty interest protecting one's good name, reputation or integrity; this was so even though the charges were in fact false.[163] Whether this holding will be broadly read so as to severely limit prior cases interpreting "liberty" interests but not concerning themselves with the public-privat aspects is not entirely clear from the Court's opinion. In sum, the courts have in recent years stepped in on an *ad hoc* basis in non-renewal cases to find a "liberty" interest in protecting one's good reputation where it has a high probability of being damaged and then requiring a due process hearing in which the charges may be defended.

To complete the analysis of the availability of constitutional procedural due process to faculty at public institutions, it is necessary to ascertain when the hearing is required (pre or post termination), whether reasons for the separation must be given, the nature of the hearing that is required, and finally the remedy that is afforded for its violation.

b. Time of Hearing

The Supreme Court in *Roth* stated "[w]hen protected interests are implicated, the right to some kind of prior hearing is paramount[164]. . .except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[165] Subsequent

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[154] Johnson v. Fraley, *supra* note 143.

[155] Huntley v. The North Carolina State Bd. of Educ., 493 F.2d 1016 (4th Cir. 1974).

[156] Hostrop v. Bd. of Junior College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972).

[157] Bd. of Regents v. Roth, *supra* note 21, at 575.

[158] Whatley v. Price, 368 F. Supp. 336 (M.D. Ala. 1973).

[159] Lipp v. Bd. of Educ. of the City of Chicago, 470 F.2d 802 (7th Cir. 1972).

[160] Brouillette v. Bd. of Directors of Merged Area IX. Alias Eastern Iowa Comm. College, 519 F.2d 126 (8th Cir. 1975); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975).

[161] Blair v. Bd. of Regents of State Univ. & College System of Tenn., *supra* note 146; Abeveta v. The Town of Taos, 499 F.2d 323 (10th Cir. 1974); Sherck v. Thomas, 486 F.2d 691 (7th Cir. 1973); Jablon v. Trustees of the Cal. State Colleges, 482 F.2d 997 (9th Cir. 1973); *But see*, Whitney v. Bd. of Regents, 335 F. Supp. 321 (E.D. Wis. 1973).

[162] 44 U.S.L.W. 4820 (1976).

[163] *Id.* at 4822. There is a vigorous dissent.

[164] Bd. of Regents v. Roth, *supra* note 21, at 569–570.

[165] *Id.* 570 f.n. 7 citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971) and *see* Bell v. Burson, 402 U.S. 535 (1971).

decisions have amplified on this point holding that the hearing should occur before the *deprivation* of the interest, not the *decision* to deprive.[166]

Suspensions have been accorded somewhat similar treatment by the courts in that absent a sufficient government interest, a pre-suspension hearing is required.[167] For example the Supreme Court in *Goss*[168] recently held that students facing disciplinary suspensions of less than 10 days were entitled to rudimentary procedural due process *before* suspension. In other cases involving public employees the lower courts have split on the question.[169] In sum, the courts have made clear that in all but exceptional cases when one is entitled to procedural due process, it should be accorded prior to deprivation of the interest.

It should be evident that *reasons* for termination or nonrenewal need not be provided when no protected "liberty" or property interest is involved;[170] and conversely, where they are involved, reasons must be given as part of the required process that is due in providing a fair hearing. In *Sindermann* the Supreme Court stated that the existence of a protected interest would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.[171]

c. Nature of Required Hearing

The nature of the fair hearing that is required by due process continues to be addressed by the courts. The Supreme Court has held that the form of the hearing may vary to be "appropriate to the nature of the case",[172] that the exact nature of the hearing can vary "depending upon the importance of interests involved,"[173] and that due process is a term that "negates any concept of inflexible procedures universally applicable to every imaginable situation."[174] As stated earlier *Sindermann* requires reasons and a hearing in which to challenge their sufficiency; beyond that the Court has indicated that "the form of hearing required . . . by procedural due process may be determined by assessing and balancing the . . . particular interests . . . " of the professor and institution.[175] Although cases not arising in higher education

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[166] Chung v. Park, *supra* note 14; Vance v. Chester Cnty Bd. of Sch. Trustees, 504 F.2d 820 (4th Cir. 1974).

[167] Examples of a sufficient government interest can be found in Pordum v. Bd. of Regents of State of New York, 491 F.2d 1281 (2d Cir. 1974) (conviction of felony); Moore v. Knowles, 482 F.2d 1069 (5th Cir. 1973) (indictment for sex crimes); *but see*, Peacock v. Bd. of Regents of Univ. and State Colleges of Arizona, 510 F.2d 1324 (9th Cir. 1975).

[168] Goss v. Lopez, 419 U.S. 565 (1975).

[169] *Id.*

[170] *See, e.g.*, Seitz v. Clark, *supra* note 145; Cusamano v. Ratchford, 507 F.2d 980 (8th Cir. 1975).

[171] Perry v. Sinderman, *supra* note 20.

[172] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[173] Boddie v. Connecticut, *supra* note 165, at 378.

[174] Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

[175] Bd. of Regents v. Roth, *supra* note 21, at 570. *See also*, Goss v. Lopez, *supra* note 162, and Chung v. Park, *supra* note 14.

may provide clues as to the minimum standards required in a due process hearing in a university setting,[176] cases have arisen in education cases so as to provide guidelines for the hearings. For example, the Fourth Circuit Court of Appeals[177] has set forth the following requirements in a due process hearing: (1) adequate notice, (2) specification of charges, (3) opportunity to confront adverse witnesses, and (4) the opportunity to be heard in one's own defense. Other cases have from time added such requirements as the right to examine a hearing officer's report before the board acts on it,[178] the right to call witnesses,[179] the right to have assistance of counsel,[180] and the right to an impartial decisionmaker.[181]

The courts have liberally interpreted the meaning of impartial "decisionmaker." For example in 1976 the Supreme Court affirmed that principle by ruling that a school board could properly conduct disciplinary hearings involving teachers who had engaged in an unlawful strike.[182]

> A showing that the Board was 'involved' in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of integrity in policymakers with decisionmaking power.[183]

The Court stated that to overcome presumed impartiality it must be shown that the decisionmakers "...had the kind of personal or financial stake in the decision that might create a conflict of interest. . ."[184] or evidence that he is not capable of judging a particular controversy fairly on the basis of its own circumstances.[185] Cases arising in the education area reflect the same liberal approach in determining impartiality.[186]

Should a university violate a professor's constitutional right to due process certain remedies are available, the most common of which is to remand the case to the school with an order to hold an appropriate hearing. Courts usually will not permit substitution of court proceedings for an inhouse institutional hearing in that it otherwise would undermine the constitutional requirement of a hearing.[187]

Reinstatement as a remedy has not been common and in *Roth* the Supreme Court stated that, after conducting a hearing required because of the affected

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[176] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[177] Vance v. Chester Cnty. Bd. of Sch. Trustees, 504 F.2d 820, 824 (5th Cir. 1974) citing Grimes v. Nottoway Cnty Sch. Bd., 462 F.2d 650, 653 (4th Cir. 1972) and *see* Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

[178] Winston v. Bd. of Educ. of Borough of South Plainfield, 64 N.J. 582, 319 A.2d 226 (1974).

[179] Nichols v. Eckert, 504 P.2d 1359 (Alas. 1973).

[180] Ortwein v. Mackey, 358 F. Supp. 705, 714 (M.D. Fla. 1973).

[181] *But see*, Simard v. Bd. of Educ. of the Town of Groton, 473 F.2d 988 (2d Cir. 1973); Swab v. Cedar Rapids Comm. Sch. Dist., 494 F.2d 353 (8th Cir. 1974).

[182] Hortonville Jt. Sch. Dist. v. Hortonville Educ. Assoc., 44 U.S.L.W. 4864 (1976).

[183] *Id.* at 4868.

[184] *Id.* 4867.

[185] *Id.* citing United States v. Morgan, 313 U.S. 409, 421 (1941).

[186] *See, e.g.*, Simard v. Bd. of Educ., *supra* note 181; Shaw v. Bd. of Trustees, 396 F. Supp. 872, 888-98 (D. Md. 1975); Simon v. Poe, 391 F. Supp. 430 (W.D. N.C. 1975).

[187] Skehan v. Bd. of Trustees of Bloomsburg State College, 501 F.2d 31, 40 (3d Cir. 1974). *But see*, Zimmerer v. Spencer, *supra* note 143.

"liberty" interest, his employer, of course, may remain free to deny him future employment for other reasons,[188] and in *Sindermann* the Court held "[p]roof of such a property interest would not, of course, entitle him to reinstatement."[189] This has been interpreted to preclude reinstatement in "liberty" infringement cases,[190] though on occasion reinstatement has been ordered by the courts.[191]

Damages have also been awarded by some courts, generally to the extent of salary lost due to the deprivation of procedural due process.[192]

C. Non-Constitutional Right to Fair Hearing

Even absent constitutional requirements to provide procedural due process, it is a fact that many public universities "gratuitously" provide hearing procedures for tenured and non-tenured faculty members. In this situation several legal aspects arise. First, the general rule is that the school once adopting the procedures must follow them regardless of whether they are established by state statute[193] or institutional regulation.[194] In those cases where a constitutional interest is not sufficiently affected, courts have correctly held that the standard to be followed is that of the regulation and not the constitution.[195] That standard has been held to be a reasonable and non-arbitrary proceeding which is "fair and adequate."[196] The court in *Arnett v. Kennedy* has further held that such procedures do not necessarily in and of themselves create a "property" interest for due process purposes.[197] Justice Rehnquist in a *plurality* opinion found that a statute covering federal employees permitting removal only for such cause as will promote the efficiency of the service when concurrently granting specific procedural guidelines "... did not create an expectancy of job retention in those employees requiring procedural protection...beyond that afforded...by the statute and related agency regulations."[198]

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[188] Bd. of Regents v. Roth, *supra* note 21, 573 n.12.

[189] Perry v. Sinderman, *supra* note 20, at 603.

[190] Wellner v. Minnesota State Junior College Bd., 487 F.2d 153, 157 (8th Cir. 1973).

[191] Stewart v. Pearce,484 F.2d 1031, 1032 (9th Cir. 1973); Univ. of Alaska v. Chauvin, *supra* note 140.

[192] Soni v. Bd. of Trustees of Univ. of Tenn., *supra* note 143; Wellner v. Minnesota State Junior College Bd., *supra* note 190; Huntley v. North Carolina State Bd. of Educ., *supra* note 155.

[193] *See, e.g.*, Brouillette v. Board of Directors of Merged Area IX, 519 F.2d 126 (8th Cir. 1975); Pollock v. McKenzie County Public Sch. Dist. No. 1, 221 N.W. 2d 521 (N.D. 1974).

[194] *See, e.g.*, Decker v. Worcester Junior College, 336 N.E. 2d 909 (Mass. 1975); Fredricks v. Sch. Bd. of Monroe Cnty, 307 So. 2d 463 (Fla. 1975); ASSAF v. Univ. of Tex. System, 399 F. Supp. 1245 (S.D. Tex. 1975).

[195] Buhr v. Buffalo Pub. Sch. Dist. No. 38, 509 F.2d 1196, 1204 (8th Cir. 1974); Ring v. Schlesinger, 502 F.2d 479, 487 (D.C. Cir. 1974).

[196] Toney v. Reagan, 467 F.2d 953, 960 (9th Cir. 1972).

[197] Arnett v. Kennedy, 416 U.S. 134 (1974).

[198] *Id.* at 163. However, the majority of the Justices concluded that the facts demonstrated the existence of a property interest which must be protected by due process meeting constitutional standards.

In summary, the case law discussed above shows that substantive constitutional rights are available to faculty members teaching at public universities. And to an increasing extent this protects many of the same interests guarded by the concept of academic freedom, thus diminishing the need for tenure to protect those areas otherwise protected by constitutional guarantee. Procedural due process on the other hand while guaranteed to those with tenure is not readily available to nontenured professors. Thus, without tenure or some equivalent property interest in continuing employment, most professors would be without the constitutional protection of entitlement to procedural due process and would instead be left to the procedures provided by the university (if any were provided) which procedures are not subject to the stricter constitutional requirement of due process.

Having described the legal relationship between rights under the constitution and tenure systems, it is thereafter a policy judgment whether to force a choice between the two. As discussed earlier, unlike court litigation of constitutional rights, tenure systems move the burden of proof from professor to institution. It has been noted that

> [U]nless 'possessed of extraordinary fortitude' many choose not to pursue a legal claim after weighing the considerable problems of expense, delay and the possible effect upon future teaching opportunities.[199]

It should also be pointed out that as institutions and state legislatures would seek to diminish the measure of job security afforded by tenure, there would seem to be a predictable and logical movement by faculty members toward seeking job security through alternative means including collective bargaining. Typically, faculty unions will attempt to provide job protection similar to that of tenure through contract clauses calling for dismissal only for good cause and after appropriate procedures are followed.[200]

III. ILLUSTRATION OF NON-STATUTORY TENURE: VIRGINIA'S SYSTEM

As can be seen from the prior analyses, many of the legal aspects of tenure have not yet been widely litigated across the country; and therefore, not unexpectedly, few tenure cases in higher education have been decided in Virginia. However, a body of law has developed and when read within the context of the earlier material provides an illustration of the likely legal status of tenure in higher education as applied to one state, Virginia, and permits a prediction of the likely outcome of litigation on the issue of whether tenure rights exist in Virginia and in other states absent their statutory conception.

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[199] Matheson, *Judicial Enforcement of Academic Tenure: An Examination*, 50 WASH. L. REV. 597, 621 (1975).

[200] *See, e.g.*, W. McHugh, *Faculty Unionism and Tenure*, in COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 194 (1973); and W. McHugh, *Effects Of Bargaining On Tenure And Other Academic Policies*, in FACULTY BARGAINING IN THE SEVENTIES (1973); and *see generally*, E. DURYEA, R. FISK, AND ASSOC., FACULTY UNIONS AND COLLECTIVE BARGAINING (1973).

A. Present Tenure Systems In Virginia

1. Constitutional and Statutory Bases

The Constitution of Virginia art. VIII, §9 provides for statutorily created and controlled institutions of higher education with governance by their individual boards of visitors. It states:

> The General Assembly may provide for the establishment, maintenance, and operation of any educational institutions which are desirable for the intellectual, cultural, and occupational development of the people of this Commonwealth. The governance of such institutions, and the status and powers of their boards of visitors or other governing bodies, shall be as provided for law.

Therefore the creation and regulation of faculty personnel policies are found in the statutes relating to a particular university including its regulations and by laws. A typical statute in Virginia gives broad, general authority to the board of visitors and is illustrated by the College of William and Mary where the Board is empowered to

> . . . control and expend the funds of the colleges and any appropriation hereafter provided, and shall make all needful rules and regulations concerning the colleges, and generally direct the affairs of the colleges . . .[201]

Additionally, §23-16 explicitly gives the institutions the right to sue and be sued on its contractual obligations and do all things necessary to carry out its powers. It would appear then that the public colleges and universities in Virginia have not created a statutory tenure system, but rather have left to each institution the authority to create regulations relating to personnel policies and enter into employment contracts with faculty members. The creation and validity of those contracts for tenure are discussed subsequently.

The community college system in Virginia is likewise created and controlled by statute but with central authority vested in the State Board for Community Colleges whose authority is ". . . the establishment, control, and administration of a state-wide system of publicly supported comprehensive community colleges."[202] A chief executive officer, the chancellor, is appointed to administer the system[203] and, subject to Board approval, shall fix salaries of employees,[204] and ". . . enforce the standards established by the Board for personnel employed in the administration of this chapter and remove or cause to be removed each employee who does not meet such standards."[205]

The Board in establishing procedures has replaced a tenure system with a system of term contracts wherein multi-year appointments based on one, three, and five-year terms are granted while a defined concept of academic freedom is specifically reserved to the faculties.[206] Personnel dissatisfied with

[201] VA. CODE ANN. §23-44 (Repl. Vol. 1973). A few institutions do have somewhat more specific authority, with several universities expressly mentioning the reservation of the right to appoint and remove professors. *E.g.*, University of Virginia, VA. CODE §23-76 (Repl. Vol. 1973).

[202] VA. CODE ANN. §23-215 (Repl. Vol. 1973).

[203] *Id.*, §§23-223,-224 (Repl. Vol. 1973).

[204] *Id.*, §23-225 (Repl. Vol. 1973).

[205] *Id.*, §23-231 (Repl. Vol. 1973).

[206] *See*, Professional Employee's Appointment Policy §1 (adopted 1972 as revised).

evaluations or non-renewals are entitled to written reasons and access to review procedures.[207] The American Association of University Professors in evaluating the policies has found them deficient and argues that they are below professional norms and therefore has voted academic sanctions against the Virginia Community College System.[208]

2. *Role of State Council of Higher Education*

In addition to the above-described college and university systems, Virginia by statute has created a State Council of Higher Education " . . . to promote the development and operation of a sound vigorous, progressive, and coordinated system of higher education in the State of Virginia."[209] Though its authority extends over state-supported institutions of higher education,[210] statutes provide that the Council may provide advisory services to private non-profit colleges within the Commonwealth on academic and administrative matters,[211] and the State Board for Community Colleges is required to "adhere to the policies of the State Council of Higher Education for the coordination of higher education as required by law."[212]

The duties of the Council are primarily advising and assisting the universities in evaluating future needs in mission, programs, and facilities and providing information to the Governor and General Assembly for purposes of proposing possible legislation.[213] However, the Council does possess authority to approve or disapprove future proposed changes in missions of institutions of higher education, new academic programs, and

> " . . . require discontinuance of any academic program which is presently offered by any public institution of higher education when the Council determines that such academic program is nonproductive in terms of the number of degrees granted and . . . budgetary considerations."[214]

Lastly it is empowered to "conduct such other studies in the field of higher education as the Council deems appropriate or as may be requested by the Governor or General Assembly."[215]

The statute creating the powers of the Council also seeks to limit its ultimate authority over the individual institutions. For example though the Council may disapprove missions or programs of institutions, it is not empowered "to affect, either directly or indirectly, the selection of faculty . . . it being the intention of this section that faculty selection policies shall remain a function of the individual institutions."[216] In specific language the Council in carrying out its duties is directed to "preserve the individuality, traditions,

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[207] *Id.*

[208] *See, Academic Freedom and Tenure: The Virginia Community College System: A Report on Tenure and Due Process*, 61 AAUP BULL. 30-39 (1975).

[209] VA. CODE ANN. §23-9.3 (Supp. 1975).

[210] *Id.*, §23-9.5 (Supp. 1975).

[211] *Id.*, §23-9.10:2 (Supp. 1975).

[212] *Id.*, §23-221 (Repl. Vol. 1973).

[213] *Id.*, §23-9.6:1 (Supp. 1975).

[214] *Id.*

[215] *Id.*, §23-9.6:1(k) (Supp. 1975).

[216] *Id.*, §23-9.1:1(b) (Supp. 1975).

and sense of responsibilty of the respective institutions."[217] Additionally, the powers of the institution are reserved as follows:

> The powers of the governing boards of the several institutions over the affairs of such institutions shall not be impaired by the provisions of this chapter except to the extent that powers and duties are herein specifically conferred upon the State Council of Higher Education.[218]

With regard to faculty tenure, it appears that though the Council can collect data and make recommendations on faculty personnel policies such as tenure, but the ability to make employment contracts that might contain tenure provisions remains with the individual institutions. However, actions by the Council could generate questions about the legal status of tenure in Virginia. For example the Council by altering a university's nonproductive degree program or disapproving a new academic program could affect the number of faculty needed at a particular institution and thus a question could arise at the institutional level as to the legal rights of a "tenured" faculty member (with rights to continuing employment) whose job was adversely affected.[219]

3. Virginia's Public Policy on Tenure

The last matter needing to be mentioned before analyzing the legality of tenure in Virginia is the apparent public policy of the Commonwealth on the question of tenure. Though the House Committee on Education of the Virginia Assembly in 1973 had before it a bill requiring the State Board for Community Colleges to rescind its policies on appointments and to establish a statutory system of tenure, the bill was never acted upon by the Assembly and the proper interpretation of that non-action is at best ambiguous.[220]

Two existing statutes perhaps give a clearer picture as to state policy, the Virginia Personnel Act[221] and the statute relating to teacher tenure rights.[222] The Assembly has recently created a statutory system of tenure for public school teachers which establishes a continuing contract scheme under which a teacher serves a probationary period of three years and then if found to have performed satisfactorily is placed on a continuing contract status during "good behavior and competent service."[223] In the event of a dismissal or suspension decision, the right to reasons and a hearing are provided to

[217] *Id.*, §23-9.6:1(h) (Supp. 1975).

[218] *Id.* §23-9.14 (Supp. 1975).

[219] Almost every university with a tenure policy permits discharge for financial exigency. *See, e.g.*, AAUP v. Bloomfield College, *supra* note 7; Levitt v. Bd. of Trustees of Nebraska state Colleges, 376 F. Supp. 945 (D. Neb. 1974); Johnson v. Bd. of Regents of the Univ. of Wisc. System, 377 F. Supp. 227 (W.D. Wis. 1974); Univ. of Alaska v. Chauvin, *supra* note 140. For further discussion of this point see text accompanying Footnotes 39-52 in Section I, *supra*.

[220] H.B. 1296 (1973 Sess.).

[221] VA. CODE ANN. §2.1-110 (Repl. Vol. 1973).

[222] *Id.*, §§22-217.1 to 217.8 (Repl. Vol. 1973).

[223] *Id.*, §22-217.4 (Repl. Vol. 1973). The statute further defines grounds for dismissal or probation as "incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence, or for other good and just cause." VA. CODE §22-217.5 (Repl. Vol. 1973) applied in Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

probationary and nonprobationary teachers.[224] The statute also explicitly reserves the right to reduce the number of teachers because of a decrease in enrollment or abolition of particular subjects notwithstanding the fact that a teacher has a continuing contract status.[225] Lastly, the statute points out that nothing in the continuing contract right shall be construed to authorize the school board to contract for any financial obligation beyond the period for which funds have been made available with which to meet such obligation.[226]

The Virginia Personnel Act applicable to most state employees was established

> . . . to ensure for the Commonwealth a system of personnel administration based on merit principles and objective methods of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of State employment.[227].

The appointing State agencies are authorized to establish and maintain methods of administration relating to the "establishment and maintenance of personnel standards on a merit basis and"[228] "an appeal procedure which shall assure all persons employed under this chapter a full and impartial inquiry into the circumstances of removal.[229] Thus it appears that a state employee has the right to continue employment absent a showing of a "meritorious cause, the merits of which may be considered at a hearing."[230] While it is true as a general proposition that public employees are usually terminable at will, *i.e.,* they have no right to continuing employment flowing from public employment itself, when a statute modifies that typical position and states that discharge must be for just cause, a question can arise whether it is a breach of contract flowing from the statutory duty to dismiss the employee absent that cause. The statute specifically exempts from coverage professors in state educational institutions, presumably because other personnel policies, including tenure policies, are applicable.[231]

In sum, the predominate public policy in Virginia appears to be that many state employees and most public school teachers should be provided some measure of job security in the form of tenured employment. Though under any tenure system a non-performing employee may be dismissed, the thrust of tenure statutes is to guarantee that legitimate grounds for dismissal do exist and that certain procedures are followed usually prior to dismissal.

B. Contracts For Tenure: Formation and Validity

Since there is no statutory system of tenure in higher education in Virginia, the formation and validity of contracts for tenure will depend on ordinary contract law. As discussed earlier, an educational institution could

[224] *Id.*, §§22-217.6, 217.7, 217.8:1 (Supp. 1975).

[225] *Id.*, §22-217.4 (Repl. Vol. 1973).

[226] *Id.*

[227] *Id.*, §2.1-110 (Repl. Vol. 1973).

[228] *Id.*, §2.1-115 (Repl. Vol. 1973).

[229] *Id.*, §2.1-114(6) (Supp. 1975).

[230] Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Bishop v. Wood, 44 U.S.L.W. 4820 (1976); Bd. of Regents v. Roth, *supra* note 21.

[231] VA. CODE ANN. §2.1-116(8) (Repl. Vol. 1973).

create a contract for tenure by entering into an agreement with an express provision for tenure or by incorporating by reference into the employment agreement, either directly or impliedly, certain college regulations creating tenure. Whether these agreements in Virginia would be found legally formed and validly enforceable is discussed below.

It can be assumed that a public university with the *authority* as is given in Virginia code §23-16 to enter into contracts may impliedly enter into an employment agreement with its faculty with a provision for tenure in the agreement. The Virginia Supreme Court in *Batcheller v. Commonwealth*[232] held that the University of Virginia

> has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted.[233]

Once authorized, the remaining questions of formation and validity of continuing contracts must be addressed. Especially intriguing is the question of whether a typical faculty employment contract will incorporate by reference the university tenure status.

The Supreme Court in *Sindermann* in discussing whether a professor had tenure for due process purposes recognized that tenure may be implied and that "[e]xplicit contractual provisions may be supplemented by other agreements implied from the 'the promisor's words and conduct in the light of the surrounding circumstances.'...and usage of the past."[234] The Court also held that, "[a]bsence of. . . an explicit contractual [tenure] provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment," so that this is matter left to state law.[235]

In Virginia there are few cases dealing with professor's tenure rights, therefore analogous case law will often be examined. In *Johnson v. Fraley*[236] the court found that continuous employment over a significant period of time can amount to the "equivalent of tenure" and provide a property interest for due process purposes. In dictum the court arguably recognized, though implicitly, the possibility that the teacher "had an implied contract amounting under Virginia law, to *de facto* tenure."[237] In *Holliman v. Martin*[238] the court, in deciding another due process case, gave implicit recognition to tenure

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[232] 176 Va. 109, 10 S.E.2d 529 (1940).

[233] *Id.* at 535. However, a recent Virginia Supreme Court case on an analogous point held that a county or school board has no implied authority to enter into enforceable collective bargaining agreements with public employees absent explicit authorization because of an expressed legislative policy against it. Commonwealth of Virginia v. The Cty. Bd. of Arlington, 217 Va 558, 232 S.E. 2d 30 (1977); *but see,* Kendall Bank Note Co. v. Comm. of Sinking Fund, 79 Va. 563 (1884); 17 Michie's Jur. Virginia and W. Virginia §11 p. 212 (1951); and *see* Hillis v. Meister, *supra* note 24. *But see*, Worzella v. Bd. of Regents, 77 S.D. 447, 93 N.W.2d 411 (1958).

[234] Perry v. Sinderman, *supra* note 20.

[235] *Id.* at 601.

[236] 470 F.2d 179 (4th Cir. 1972).

[237] *Id.* at 184 n.l.

[238] 330 F. Supp. 1 (W.D. Va. 1971).

where, in dictum, the court found a probationary professor could be dismissed more easily than one with tenure:

> It is most important that this standard is considerably less severe than the standard of 'cause' used in the dismissal of tenured faculty.[239]

And lastly, a Fourth Circuit case arising in Maryland found a teacher could prove an express or implied contractual right to academic tenure.[240]

The issue of incorporation by reference can arise first by an express reference in the contract that tenure rights are conferred as defined in writings outside the contract. The Virginia Supreme Court in *W.D. Nelson & Co. v. Taylor Heights Development Corp.*,[241] involving an interpretation of a lease agreement, found that writings referred to in a contract but existing outside it, "are construed as part of the contract."[242] A faculty member's contract not containing an express reference to tenure rights raises the issue whether an institution's tenure policies in the regulations become part of the employment agreement. In 1975 the Virginia Supreme Court in upholding the dismissal of a teacher held

> The law in existence when plaintiff entered into the contract of employment became a part of the contract, and therefore the statutory provisions providing that the Board could dismiss plaintiff at any time for certain causes was a part of her contract.[243]

An earlier case made clear that regulations are likewise incorporated into agreements:

> In Virginia, . . . and generally in other jurisdictions throughout the country, it is settled that relevant statutes and regulations existing at the time a contract is made become part of it and must be read into it just as if they were expressly referred to or incorporated in its terms.[244]

Although the extent to which university regulations can be analogized to other types of government regulations is at times nebulous, precedent outside Virginia holds that such regulations are impliedly incorporated into the employment agreement and must be followed.[245] Thus in view of the developing body of law outside Virginia and within, it would appear probable that a professor teaching at a Virginia university could properly claim a right to tenure that has been granted to him by university policy.

The issue of the legal validity of tenure contracts has arisen in Virginia under the somewhat analogous description of "permanent employment" contracts. The Supreme Court of Virginia has held that

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[239] *Id.* at 11.

[240] Parker v. Bd. of Educ. of Prince George's County, Md., 348 F.2d 464, 465 (4th Cir. 1965).

[241] 207 Va. 326, 150 S.E. 2d 142 (1966).

[242] *Id.* at 146.

[243] Cnty. Sch. Bd. of Spotsylvania v. McConnell, 215 Va. 603, 212 S.E. 2d 264 (1975).

[244] General Electric Co. v. Moretz, 270 F.2d 780, (4th Cir. 1959).

[245] *See, e.g.*, Greene, *supra* note 25; and Hillis v. Meister, *supra* note 24.

> It is a settled doctrine in this State that where no specific time is fixed for the duration of an employment, there is a rebuttable presumption that it is an employment at will, terminable at any time by either party.[246]

However the Court held that where an employee can be terminated only for just cause it is no longer terminable at will and is enforceable.[247] The Court held

> . . . a definite time was fixed for the duration of the employment. It was by the terms of the contract, to continue until the plaintiff gave to the defendant just cause to end it. . . . . It was a promise in return for services which the plaintiff performed and which furnished sufficient consideration for a binding contract. In such a case the doctrine of mutuality is inapplicable.[248]

The analogy to the university setting seems clear, a contract for continuing employment and of indefinite duration has Virginia precedent to find it validly enforceable.

The question arose in the earlier analysis regarding the efficacy of a clause placed in the university regulations disclaiming any legal effectiveness of the tenure rights provided; as there appears to be an absence of Virginia law on this point, one can assume that it will meet with the same close judicial scrutiny if not hostility as discussed before.[249]

Additional issues relating to the enforceability of tenure contracts can include whether a one-year contract, the normal length of contracts in four-year colleges in Virginia, given to a tenured professor causes a waiver of rights to continuing employment (*i.e.*, tenure). Law outside Virginia has concluded negatively and Virginia case law by analogy would seem to predict the same result in that knowledge and intent to waive are normally prerequisites.[250] In point of fact, the justification for one-year contracts flows from the Virginia Constitution Article X §7 which in pertinent part reads

> No money shall be paid out of the State treasury except in pursuance of appropriations made by law; and no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same.

Interestingly, faculty contracts at community colleges may be up to five year appointments yet there is no qualifying language in the contract to indicate the constitutional limitation. One can only presume there is no problem agreeing to employment contracts for a duration exceeding two and one-half years as long as it is understood to be subject to appropriate funding. Of

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[246] Norfolk Southern Ry. Co. v. Harris, 190 Va. 966, 59 S.E. 2d 110, 114 (1950); *see also* Wards Co. v. Lewis & Dobrow Inc., 210 Va. 751, 173 S.E. 2d 861 (1970).

[247] *Id.* at 114.

[248] *Id. See also*, F. S. Royster Guano v. Hall, 68 F.2d 533 (4th Cir. 1934) where the Fourth Circuit enforced a lifetime contract made in settlement of a personal injury claim and found it not to fail for indefiniteness.

[249] *See* text accompanying footnotes 144–147 in Section II.

[250] *See, e.g.*, Woodmen of World Life Ins. Soc. v. Grant, 185 Va. 288, 38 S.E. 2d 450 (1946) where it is pointed out that the holder of contractual rights may waive them expressly or impliedly or by conduct, act, or course of dealing, but he must have knowledge of his rights and intend to waive them.

course the agreement would incorporate by reference the above constitutional provision.

A final legal issue relating to tenure contracts, assuming they have been validly created and are enforceable, is whether tenure once granted is a vested contract right or whether it can be unilaterally taken from the tenured professor. There is a clear absence of case law on this point nationally, though a recent decision is somewhat related. In *Rehor*,[251] the court held that a professor who had certain vested retirement rights including retirement age had agreed to permit reasonable alterations of them and at any rate by a new agreement, supported by additional consideration, could and did modify those rights. The court found consideration was present in that the professor accepted a change in those benefits and received an increased salary during his remaining years at the institution and additionally such changes were permitted by the agreement itself.

The Virginia Constitution, articles I & II appears to speak to this issue, assuming there is a valid contract, when it forbids the General Assembly to "pass any law impairing the obligations of contract."[252] Case law interpreting this section has held that it is settled law in Virginia that a statute in force at the date of contract is an element of it as to its construction and binding force or obligation, as much as if the written contract so declared.[253] Also it has been held that a right is deemed vested when it is so fixed that it is not dependent on any future act, contingency or decision to make it so secure.[254] The remaining question is whether such university regulations creating rights to tenure are within the meaning of "vested" and "statute" under the Constitution. Absent legislation, only litigation can resolve that issue.

A professor's employment contract with tenure is of course a personal services contract; and therefore, should a breach of it occur, damages are the usual remedy in Virginia.[255] As in other contract cases exceptions are made where it can be shown that damages are inadequate in which case specific performance will be decreed. Although instances of the exception exist in Virginia, for example where damages were inadequate,[256] and the value of the services were not capable of pecuniary estimation,[257] few courts in or outside of Virginia have permitted reinstatment in personal services contracts on the ground that equity will not compel the continuation of an

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[251] Rehor v. Case Western Reserve University, *supra* note 25; also see text accompanying footnote in Section I *supra*.

[252] VA. CODE ANN. §1-6 (Repl. Vol. 1973) also states that the repeal of any statute validating previous contracts or transactions shall not affect their validity. The legislature may, however, change rules of procedure except as restrained by the Constitution. Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917).

[253] Hawes v. William R. Trigg Co., 110 Va. 165, 65 S.E. 538 (1909).

[254] Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 124 S.E. 482 (1924).

[255] *See, e.g.*, Fanney v. Virginia Investment and Mortgage Corp., 200 Va. 642, 107 S.E. 2d 414 (1959); Thompson v. Commonwealth, 197 Va. 208, 89 S.E. 2d 64 (1955); and 17 Michie's Jur. Virginia and West Virginia §66 p. 101 (1951).

[256] Grubb v. Starkey, 90 Va. 831, 20 S.E. 784 (1894).

[257] Adams v. Snodgrass, 175 Va. 1, 7 S.E. 2d 147 (1940).

incompatible personal relationship.[258] In *Greene v. Howard*[259] the court refused to reinstate professors for the following reasons:

> It would be intolerable for the courts to interject themselves and to require an educational institution to adhere or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best tradition of education.[260]

However, recent case law, though infrequent, has indicated a flexible application of this rule. For example in *Bloomfield College*[261] the New Jersey court ordered reinstatement where termination was based on unsubstantiated grounds of financial exigency rather than on dissatisfaction with services. The court analogized this to the "route by which specific performance is obtained against a state body on the basis of contracts arising from statute,"[262] the substance of which is "nothing more than to compel adherence to academic tenure commitments on the part of an educational institution."[263] At least one non-contractual case has arisen in Virginia courts relative to remedies in higher education where reinstatement was found permissible for violation of constitutional rights. In *Holliman v. Martin*[264] a professor at Radford College sought reinstatement on the grounds she was unconstitutionally terminated due to arbitrary and unfounded reasons or exercise of a constitutionally protected right. The court denied the professor's claim but held that a nontenured professor's dismissal must be based on the exercise of judgment, not capriciousness of rightful exercise of constitutional rights, and held that although bases given for nonretention will require very minimal factual support, "if the College when brought into Court refuses to give any reason for its action and relies solely on its discretionary authority, the professor would be entitled to summary reinstatement."[265]

In sum, although there are winds of change, the likely remedy in Virginia for breach of a professor's contract for tenure would be damages.[266]

C. Tenure And Constitutional Rights In Virginia

Since the U.S. Constitution has national application, earlier analyses of constitutional cases are sufficient, but some brief mention of cases arising in Virginia will be given. Cases arising in Virginia adhere to the principle that substantive constitutional rights apply to nontenured as well as tenured professors.[267] The concept of academic freedom which some case law suggests

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[258] 11 J. WILLISTON, CONTRACTS §1450 (3d ed. 1968); 5 A CORBIN, CONTRACTS, §1204 (1964).

[259] *Supra* note 25.

[260] *Id.* at 615.

[261] 129 N.J. Super 249, 322 A.2d 846, 859 (1974); *aff'd* 346, A.2d 615 (App. div. 1975).

[262] *Id.*

[263] *Id.* The court turned down the argument of probationary period was sufficient. *Id.* at 860.

[264] 330 F. Supp. 1 (W.D. Va. 1971); Phillips v. Puryear, 403 F. Supp. 80, 88 (W.D. Va. 1975).

[265] *Id.* at 12.

[266] For a recent similar holding *see* Bruno v. Detroit Institute of Technology, *supra* note 25.

[267] *E.G.*, Phillips v. Puryear, *supra* note 264; Holliman v. Martin, 330 F. Supp. 1 (W.D. Va. 1971).

would largely be subsumed under constitutional rights is arguably more closely regulated in Virginia than in many other institutions of higher education outside Virginia. Though there is no clear case law in Virginia discussing the relationship of academic freedom to the first amendment, it must be noted that statutory regulations appear that would place restraints on what some might consider falling within or near a fine-line definition of academic freedom. For example at Virginia Polytechnic Institution the board is authorized to prescribe not only the duties of the professors and courses of instruction but also the "mode" of instruction.[268] Of course it is not clear that such a prescription in any way would intrude into an area of academic freedom, but it would seem to indicate the absence of reluctance by the legislature to legislate into an area traditionally reserved to institutions and their faculty and touching on matters embodied in their non-legal right of academic freedom which is normally protected by tenure procedures. So again, the conclusion on the relationship between tenure and substantive constitutional rights is that new case law is emerging which may well protect the same non-job security interests as are protected by academic freedom, but that at this point in time it is not clearly accomplished by the courts.

The final area of analysis deals with a faculty member's right to a due process hearing. As discussed in *Roth* and *Sindermann,* absent a liberty or property interest, a professor has no constitutional right to a hearing on his nonrenewal. Cases arising in Virginia confirm these principles which adhere to the distinction between tenured and nontenured professors, finding the former but usually not the latter entitled to a hearing.[269] Examples of decisions finding "property" interests have been dismissal during the term of a contract[270] and substantial longevity in employment creating a legitimate expectation to continued employment.[271] An illustration of the court finding a "liberty" interest where one's reputation was adversely affected occurred when an institution suspended a professor on the basis he posed "a substantial threat to the welfare of the institution."[272]

An additional constitutional limitation on nonrenewal of faculty occurred in *Holliman v. Martin*[273] where the court found that although a nontenured professor at a public institution may have no rights to procedural due process, an institution must not act arbitrarily or capriciously in its decision not to retain the probationary professor. Though the professor was not entitled to a due process hearing he was entitled in the court proceeding to have some reasons for his dismissal presented.[274] The burden of proof there as in other claims of unconstitutional acts by the institution remains with the professor.[275]

[268] VA. CODE ANN. §23-125 (Repl. Vol. 1973).

[269] *See generally*, Holliman v. Martin, *supra* note 267; Phillips v. Puryear, *supra* note 264; and *see* Kota v. Little, 473 F.2d (4th Cir. 1973).

[270] Phillips v. Puryerr, *supra* note 264.

[271] Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

[272] Phillips v. Puryear, *supra* note 264, at 85; *see also* Huntley v. North Carolina State Bd. of Educ., *supra* note 155.

[273] *Supra* note 267.

[274] *Id.* at 11.

[275] *Id.*

The nature of the constitutionally mandated due process hearing is, as discussed earlier, flexible but requiring the elements of a fair hearing. In addition to the Supreme Court decisions mentioned earlier, the Fourth Circuit has set forth certain guidelines in such hearings as including "adequate notice," "specification of charges," "opportunity to confront adverse witnesses, and the opportunity to be heard in one's own defense."[276] The hearing includes an unbiased decision-maker and evidence of bias would make the hearing inadequate.[277]

In sum, the legal aspects of tenure are increasing as litigation uncovers and sometimes appears to create new and far-reaching legal implications. A full understanding of these possible legal ramifications should be of aid to those considering the viability and desirability of tenure, as well as provide guidance to the extent one has judicially enforceable tenure rights or obligations absent a statutory system of tenure.

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[276] Vance v. Chester Cnty. Bd. of Sch. Trustees, 504 F.2d 820, 824 (4th cir. 1974) citing Grimes v. Nottoway Cnty. Sch. Bd., 462 F.2d 650, 653 (4th Cir. 1972).

[277] *See*, Phillips v. Puryear, *supra* note 264. *See also* Hortonville Jr. Sch. Dist. v. Hortonville Educ. Assoc., 44 U.S.L.W. 4868 (1976).